Excellences of the

COMMON LAW

BRENT WINTERS

Excellence

of the

Common Law

Compared and Contrasted
with

Civil Law

In Light of History,
Nature & Scripture

Brent Allan Winters

—American Common Lawyer—

EXCELLENCE OF THE COMMON LAW
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Where the Spirit of the Lord is, freedom is.

2 *Corinthians* 3:17

Dunwallo Molmutius arose [about 510 B.C.] . . . This king established among the Britons . . . the Molmutine Laws—which even today are celebrated amongst the English . . . He ordained that the . . . the cities should enjoy such privileges as that, in case any runaway or guilty man should take refuge therein—he should depart thence [*cf. Numbers* chapter 35] . . . Moreover, . . . that the roads . . . be held inviolable . . . In his days, the knife of the cut-throat was blunted—and the cruelties of the robber ceased in the land . . . [H]is son Belin [from around B.C. 455] . . . confirmed the Laws which his father had ordained, and commanded that even and steadfast justice should be done throughout the realm . . . He . . . proclaimed it as of . . . ***Common Law*** that condign punishment should be inflicted on any that do violence . . . If any would know [this law] . . . let him read the Molmutine Laws that Gildas the Historian [520 A.D.] did translate out of the British into Latin, and King Alfred [871 A.D.] out of Latin into the English tongue. —GEOFFREY ARTHUR: HISTORY OF BRITAIN'S KINGS, II:17–III:5 (1138).[1]

Magna Carta or the Great Charter (15 June 1215) . . . secured very important liberties . . . to every order of men in the kingdom—to the clergy, to the barons, and to the people . . . John seemed to submit passively; but he . . . secretly sent abroad emissaries to enlist foreign soldiers; and he dispatched a messenger to Rome in order to lay before the Pope [Innocent III] the Great Charter . . . Innocent—considering himself as feudal lord of the kingdom—was incensed at the temerity of the barons. He issued a bull, in which he annulled the charter . . . The civil rights of individuals were protected by that venerable body of ancient customs which, under the name of the ***Common Law***, still obtains in our courts of justice. Its origin is lost in the obscurity of remote antiquity. —PROF. J.S. BREWER: THE STUDENT'S HUME, III: 7:8 & III: 12:14 (1883).[2]

The inhabitants of the said [Northwest] territory shall always be entitled to . . . the writ of habeas corpus, and of the trial by jury . . . and of judicial proceedings according to the course of the ***Common Law***. —AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO art. II (1787).

This Constitution . . . shall be the supreme law of the land . . . Done in Convention by the unanimous consent of the States present, the 17th day of September in the year of our Lord 1787 . . . In suits at ***Common Law*** . . . , the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the ***Common Law***. —U.S. CONST. arts. VI, VII & amend. 7 (1787).

Therefore, stand fast in the freedom wherein Christ has freed you.

Galatians 5:1

stand *steady* and hold fast . . .

2 *Thessalonians* 2:15

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[1] *Quoted in*, BARRISTER-AT-LAW AND REV. FRANCIS NIGEL LEE, COMMON LAW: ROOTS AND FRUITS. THE ROOTS OF COMMON LAW IN BIBLICAL, IRO-SCOTIC, BRYTHONIC & ENGLISH JURISPRUDENCE—AND SOME OF THEIR FRUITS IN GREAT BRITAIN, AND THE UNITED STATES AND AUSTRALIA v (1993) (1997).

[2] *Id.*

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Unprovided with original learning, unformed in the habits of thinking, unskilled in the arts of composition, I resolved to write a book.[3]

SIR William Mitchell Ramsey observed that God gives knowledge, often through others.[4] Many among the writer's family, kindred, and teachers have graciously—and patiently—imparted their learning and understanding. In this book, the writer has used knowledge gleaned from them, both witting and unwitting.

The writings of John Wyclif, John Fortescue, Edward Coke, Joseph Story, Thomas Babington Macaulay, Henry Sumner Maine, F.W. Maitland and W.S. Holdsworth, among other works too numerous to list, have contributed. For the discussions in §§ 4.3.2 and 4.3.2.3 of this book, the writer credits Lysander Spooner's analysis of Magna Carta chapter 39 in his *Essay on the Trial by Jury*. For parts of the narrative concerning the life of Steven Langton, in § 3.7.2 of this book, the writer credits Janel McCarty's *National Archives and Records Administration*, found at www.magnacarta.com; for parts of the narrative concerning the life of Edward Coke, in § 3.7.8, the writer credits *Online Library of Liberty*, found at <oll.libertyfund.org>.

The writer's experience with mining law and study of its sources, precepts, and universal application,[5] coupled with practice in our courts, have strengthened his convictions. Mining, dealings with the Miner's Law, and it spontaneous growth in modern times from budding common law[6] has uncovered the unchanging thread running through law, nature,

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[3] Edward Gibbon.

[4] "A man's education," says Ramsey, "lies not in what is common to all, but in what is special to himself." WILLIAM MITCHELL RAMSEY, THE EDUCATION OF CHRIST 41 (photo. reprint 1981) (1902).

[5] See generally app. 1 of this book (discussing the common law of the miner as a manifestation of the law of nature).

[6] The writer uses the phrase *common law* to indicate that fundamental tradition of law and government tracing to the early Celts, Anglo-Saxons, and Jutes, from whence it has continued through to present times. Through the centuries, the common-law tradition has added to and refined its forms, processes, and specific applications of law; but its foundations have stood fast. The common law defines and distinguishes itself by its uncommon fundamentals, scarce among nations. See generally § 3.7.1 of this book (discussing the origin and use of the phrase *common law*).

and God's written revelation.[7] His creation and His directives form a unity of purpose and plan, which is all embracing, reliable, and beneficial.[8] During the gathering of information and drawing of conclusions, the writer has remained conscious of Scripture, testing points and conclusions against the original text, according to light given.

Through the years, ongoing discussion with Susan has sharpened the ideas in this book. By allowing me the necessary time, my family—Susan, Caleb and Beth, Jeremiah, Cacey, Jenny, Christy, Joy, Clark, and Jill—has enabled my writing this book. Though the writer presents his subject from his outlook, he sets forth no new ideas, but ancient ideals, nevertheless new as the reader ponders and applies these afresh to new people and new facts.[9]

Brent Allan Winters
Nevada County, California
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[7] See generally app. 1 of this book (showing that the Miner's Law has arisen among separate neighborhoods of miners over the centuries and around the globe, has always been fundamentally alike at each location worldwide, and is discernable by all men at all times).

[8] After the boll weevil destroyed cotton farming in the Southern states, the ex-slave George Washington Carver, made peanut farming profitable by discovering over 300 derivative products from the peanut. As a young man, he once said that he asked God to show him the mystery of the universe. According to Carver, God replied, "George, I have decided instead to show you the mystery of the peanut." Carver recalled, "I later realized that in revealing to me the mystery of the peanut, God taught me the mystery of the universe." The writer's experience with the Miner's Law has been kindred: within the small and isolated bailiwick of mining law he saw that God has universally stamped into mankind the capacity to recognize common fundamental precepts of due process and substance meant to order relationships by rightly arranging rights and responsibilities among miners and with non-miners. Scripture teaches that man is able to recognize right law and government in all other areas of human activity and relationships as well. See generally § 5.1.2 of this book (discussing God's stamp on each person, enabling the discernment between right and wrong behavior: i.e., law).

[9] See generally app. 16 of this book (discussing the necessity of the individual experience of discovering eternal truth afresh). *See also generally* HAROLD BERMAN, LAW AND REVOLUTION 60–68 (1983) (referencing the timeless immutability of the ancient Anglo-Saxons' folk law).

Preface

THREE principles of law and government that arise from Scripture lie at the foundation of the common-law tradition. *First*, the only lawful exercise of law and government is ministerial: every magistrate and officer holds his office, authority, and power at the pleasure of God to whom he is responsible and to whom he will answer for the doing of his office. *Second*, God alone is LORD of the individual conscience: each individual, from the private person serving as juror to the public magistrate and officer, is responsible before God to inform his conscience aright and to exercise independent judgment in determining his convictions and acting upon them; his duty of independent discernment is non-delegable. *Third*, obedience to any command contrary to God's desire is always wrong. Moreover, when the individual answers to God for the doing of his office, God will never allow him to take refuge in his frank obedience to, or tacit conformity with, the judgment of any other mortal or combination thereof, regardless of threats, demonstrations of power, claims to authority, or assertions of infallibility. One's only true safe harbor is in one's obedience to the God of Scripture, as one informs one's conscience aright with Scripture and whets his discernment into evermore-sharp obedience. The common-law tradition rests on the foregoing three principles for its foundation and is consonant[10] with them. Any doctrine or act said to be a part of the common-law tradition that is inconsonant with any of these three is not a part of the common-law tradition. By contrast, the civil-law tradition is inconsonant with the foregoing three principles.

Popular politics will erode our liberty of life and property unless experiential and right knowledge of our common-law courts and government is second nature to the individual American. Good

[10] In this book, the writer further uses the terms *consonant* and *inconsonant* to distinguish those human expressions of law (principles and standards) in accord with truth (consonant) from those in discord with truth (inconsonant). Thus, if obedience to true law violates some human expression, or obedience to the human expression violates true law, that human expression is inconsonant with truth.

government is right government, but right government will prevail only as individuals found it on the common-law ideals as the courts articulate them in response to real controversies. Though at times legislation can be a catalyst to right action, reliable evidence of the law and good government emerges best, not through the broad and undiscerning brush of legislators, but from individual cases and issues sharpened in the courts.[11]

Our Constitution is not *legislation*, as civil-law jurists understand the term: a product of superior reasoning of an elitist class. It is, rather, common-law principles of government put to paper using common law terms: the fruit of centuries of judicial struggle—thus its staying power, strength, and reliability. Though legislation has its common-law and constitutional use, America will get along well with a minimum of legislation. In order, however, for the principles of the Constitution to prevail, the local county court with the Jury—not the statehouse or the federal capitol—must become foremost in the American perception of law and government. Because the Constitution's ideals of law and government arise from common-law principles uncovered and refined by jury verdicts and judicial findings in tailored application, the Constitution's ideals will fail without accessible and reliable common-law courts.

Common-law due process, real only in practice, fashions the backbone of the Constitution and breaths life into its members. Thus, due process supplies the spinal support that enables the Constitution to stand upright and the animating principle that enables it to walk with us in practice. Put another way, common-law due process is the life force of constitutional law that enlivens its principles to safeguard our rights of liberty, and without which the Constitution is an empty, deflated form. By contrast, civil law is utopian in outlook, putting a wishbone for the backbone and an unlimited government of men for a government limited by law.

History shows that in a country where the individual partakes in the process of particular justice (the only kind of justice) by serving as juror, the widespread understanding that comes only from such experience tethers government to the common sense of the common law. Further,

[11] In this book, the writer uses the term *courts* in two contexts: the common-law tradition and the civil-law tradition. Used in the context of the common-law tradition, "courts" connotes individual jurors and judges; used in the context of the civil-law tradition, the term denotes judges only. Common-law courts conduct contests over the validity of law and its application in particular circumstances; civil-law tribunals are places where judges determine legislative will and issue decrees.

close participation in the courts encourages confidence in the law, resulting in respect for its precepts and lawful behavior. As Americans, however, give undue time and attention to legislators seeking to remedy the novel conflicts that forever bob forth from the flux of humanity—but precious-little time and attention to understanding and invoking our common-law first principles—, legislators will work like osteoporosis to decalcifying the Constitution's backbone: the common-law tradition.

Government dependent on legislators discourages close participation in the processes of particular justice necessary for confidence in the law and respect for its precepts. By its nature, legislation denies the minority opinion on any given matter and commands the majority will. The tone of legislation is broad and commanding; the tone of the courts is fitting and reserved. Legislation decrees; courts of record make findings and render opinions. The statutory commands of a faceless state are dogmatic, undiscerning, impersonal, and thus, often disheartening. With independent jurors and courts, however, jury verdicts and reasonable court opinions can be respectable and acceptable.

The authority of the United States and of the several states lies only within the processes of the common law. The politicizing of every American through popular politics in disregard of the common-law tradition will never result in lasting national strength. Popular politics lacks a keen sense of the eternal majesty of the law and will ultimately dissatisfy and discourage; only the triumph of true law in individual cases through due process satisfies. The strength, uniqueness, and aspiration of our common-law government is not the consensus of popular politics, but the insistence upon right due process, i.e., according to the regular course of the common law. For example, in the common-law tradition, the legislator uses popular politics to check executive power; the courts (litigants, jurors, and judges) champion the quest for true law as a check on executive power and legislative majorities.

To place hope in the strong arm of executive power or popular politics is to trust the government of a man or of men in popular assembly. Confidence in executive power and legislative majorities in exclusion of the proven processes of the common law to effect discernment between good and evil, right and wrong will result in the tyranny of the total state. Where jurors, witnesses, or litigants give attention to intelligent participation in the processes of the common-law tradition, they insist upon a government of law. Intelligent experience, rightly informed with a sense of common-law due process, will supply the boldness necessary to assert common-law limits for government, enabling liberty in deed. Only

in the common-law tradition is "political or civil liberty . . . the very end and scope of the constitution"[12] of law and government. Broad participation in popular politics can satisfy expedience, but good government overcomes only through individual understanding that comes by partaking in our common-law courts.

The common law focuses on due process, not on a desired result. Following the right process by asking the right question can yield a right result, viz., justice; following the wrong processes by asking the wrong questions will never yield the right result.[13] The processes of the

[12] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 6 (photo. reprint 1979) (1st ed. 1765).

[13] By giving to the Hellenized Jewish lawyer His narrative of the Samaritan and the merchant, Christ demonstrates that focusing on process instead of a desired result enables the best opportunity to arrive at truth. *See Luke* 10:25–37. That this narrative is not a parable is evident in that Christ prefaces it by referencing a *certain man*, a *certain priest*, and a *certain Samaritan*; whereas He prefaces His parables with comparative phrases such as "the Kingdom of heaven is *like* . . . ." Thus, the case of the good Samaritan is no hypothetical intended to transfer the listener from that which is familiar—as set forth by simile or parable (*παραβολη: parabolay*)—to a new concept, but rather, is a real case example, known to His hearers, intended for analogy. By His specific references to certain persons, Christ recounts an event known to His listeners, thereby capturing their interest. Further arresting their attention, Jesus included in the narrative the Jews' foremost object of racial hate: the Samaritan. His method, then, was not comparison, but by citing a real and concrete case, He demonstrated the process that allows the framing of the right question, without which, finding the right answer is impossible. To be effective, this process demands sharpened issues, which arise only where conflicting convictions clash over real happenings—such as the robbery, attempted murder, and the Samaritan's astonishing rescue of the Jew on the Jericho Road.

Luke's record of Christ's encounter with the civil-law-minded lawyer is in keeping with Luke's purpose in writing his Gospel: to target those that have embraced the Greek culture, which venerated human potential as man's greatest hope. Thus, Luke presents Jesus Christ to be the fulfillment of Greek aspiration of the ideal man, perfect in form and reasoning ability. Then as now, the Hellenized cultures—those adoring and pursuing all that pertains to Greek ideals—of the first century comprised the humanist: the one placing his faith in the mind of man, having been perfected in reason, as the measure, or standard, of all things. Then as now, the humanist relied upon the logic-trained human mind to arrive at truth through reason abstract from life and facts. Luke, therefore, presents Christ as God confined to the span of the human body and the only man able to fulfill the humanist's ideal of the *λογος* (*logos*): perfected reason able to reveal truth.

"And look," Luke begins his narrative in *Luke* 10:29, "a certain lawyer," intent upon the desired result of self-justification (*θελω, thelō*: "determined" to justify himself), demanded all attention (he stood up), and posed to Jesus his question: "Who is my neighbor?" Jesus, however, never answered his question, but instead demonstrated that the lawyer's wrong question barred any possibility of the right answer. Not only was the lawyer's question unrelated to any real-life facts, the he had framed it backwards. Jesus, by presenting the facts of a concrete case, showed that with proper process, asking the right question (not aimed at self-justification, i.e., result focused), one can arrive at truth and obey truth.

After recounting the facts of the Samaritan's case, Jesus presents the right question: "Who was neighbor to him that fell among thieves?" That is, who responded in the manner of a neighbor? Who was neighborly? Jesus' real case of the Samaritan and His insistence upon focusing not on the desired result, but upon the proper process in seeking truth, was

common-law tradition are consonant with Holy Writ. The one having outfitted his conscience with the principles of Scripture, and having informed his understanding with the common law's applications of those principles, will occupy and hold the ground allotted him against evil.

Ignorance of our common-law tradition of courts and the Jury has spread from the Church outward. The Church, by offering justice through the Jury, will teach the application of the above-cited three first principles: all human government is derived, God alone is LORD of the individual conscience, and every attempt to find refuge in obedience to *the powers that be* for ultimate justification of one's actions will fail. Justice supplies the minimum requirements of duty concerning one's relationships with others and is best-learnt and known through experience.

Experiencing of the saving grace of God brings the understanding and appreciation necessary to motivate one to ever-wiser obedience—i.e., refined by ever-keener discernment—desired by God. The obedience of faith is the fruit of understanding God's acceptance (grace) made possible by the satisfaction of divine justice in the sacrifice of Christ. Moreover, lack of appreciation of God's graciousness results in lawlessness.

Consonant with Scripture, the common-law tradition insists upon a limited executive, legislature, and judiciary, each with defined power meant to curb the other two. The legislator's culture—as the executive's—is one of politics, i.e., based on the majority principle. To gain his office and remain, he must imbibe the atmosphere of the majority spirit and will pay dearly if he grieves that spirit. His failure to respond to the urgency of the immediate is to court political peril. Even if committed to enacting legislation good and true, he must first divine the dominant political impulse: legislators are crowd pleasers. History shows that while dictators and tyrants seek to dominate and enslave others to themselves in the present, legislators unchecked, in their willingness to satisfy in the

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in keeping with His pattern of teaching. According to Phillip Yancey, individuals came to Christ with a question 183 times, but in response, Jesus answered only three of these questions directly. In all other cases, He responded with the right question, placing responsibility upon the individual for the conclusion and application.

As was the Hellenized lawyer in *Luke* 10:25–37, the civil-law tradition focuses not upon adhering to right process but upon achieving a desired result: the state's self-justification and compliance with the will of the state, as expressed by the scholar-legislator. The scholastic tradition, based on the Greek thinkers and developed in the civil law's support, aims at justification of the status quo, i.e., the state's present domination, which Tyndale later called *the powers that be*. By contrast, the common-law tradition focuses on the right process (due process), by concentrating on discerning right questions and relying upon observance of enough process to render up truth: freeing truth from suppression under lawlessness, allowing it to rise and be seen.

present, will enslave their constituents for the future. The people clothe their legislators with authority to bind the people in perpetual debt to moneylenders. Such an atrocity, legislators have proven willing to do in an effort to relieve the majority's fear.

The common-law judiciary and Jury, on the other hand, work in a tradition of law and government not only separate from the majority principle, but even demanding denial of the majority. Still, men at their best are only men at best; those filling the judicial function and juror's role are—as are those filling the legislative offices—fallible. Though the majority or democratic spirit sometimes creeps into the courts, it is a foreign spirit there; it remains the duty of the juror and judge to sense its intrusion and resist it, causing it to flee.

Thus, the dignity and duty of the courts demands that the Jury and judge work in an atmosphere of right and law, never majority and might. Whether emerging from the guts of the individual juror, the conscience of the litigant, the informed zeal of the lawyer or judge, or out of simple moral outrage of any of these. The Spirit of right moves were He wills and at His pleasure can enter the judicial process through any feature of the participants' personalities. Unlike the civil law, the common law never limits the point of entry of right, law, and justice into government to trained and perfected human reason (a downright impossibility) expressed by a written code.

Though the common-law tradition is consonant with the Word of God written, it depends upon the God-bestowed natural ability of each person to find truth in fact and law. The taint of sin, however, has corrupted every aspect of the individual's being, exposing him to the control of evil. Consequently, the enlightening of truth to his understanding occurs only as the Holy Spirit accesses and arouses his consciousness through one of the tainted portals of his personality. Through the weakness of his fear or foolishness, pathos or bathos, the strength of his courage or windows of lucidity in his reason, God channels truth into law and government among men. As God counseled truth into the High Court of Israel through the nefarious schemes of Caíaphas and into the understanding of the prophet Balaam through the mouth of the jenny,[14] God counsels truth into the judicial process through any participant in that process, regardless of his spiritual state or motivation.

[14] Both the English and the Hebrew tongues tell apart the *jenny* (אתון: *athone*) from the *jack* (חמור: *chamor*); Scripture is careful to distinguish the two.

Preface

Through divine providence, common-law courts look for the entry of truth by many avenues and especially through the juror, drawn at random from all conditions and walks-of-life. From the human perspective, therefore, the common-law tradition is not foremost a moral order of imperial legalism, but is a tradition of process out of which Providence shows us the fitting application of moral principles. By demanding faithful observance of adversarial due process, the common-law tradition requires that we trust Providence for the outcome: the uncovering of truth and the revealing of the fitting application of the law in spite of our ignorance, biases, and mortal frailties.

In sum, the civil-law tradition seeks conformity to the will of the state as expressed in its legislation. The common law adheres to right process, focusing its attention on insuring the process due each party before the court. The common law relies on observance of due process to render up a right and fitting outcome. Thus, the aim of the common law is to observe due process with a view toward individual justice; the goal of the civil law is universal compliance with the will of the state. Civil law begins its analysis of legal issues by affirming legislation to be the true and one-size–fits-all *universal application* of justice to any particular legal dispute. Common law, on the other hand, begins by affirming that following due process provides the best opportunity for emergence of the *fitting application* of the principle. Civil-law judges venerate the legislative code; common-law courts allow the adversity afforded by due process to test legislation's application. While legislators are blown about by political winds, common-law courts are steady subjects of fixed principles of law.

Chapter One

Introduction

§ 1.1 *Threshold Matters*
§ 1.2 *Worth of Legal History*
§ 1.3 *Common Law: Every Man's Law*
§ 1.4 *Common-Law: Tradition of First Principles*
§ 1.5 *Common-Law Ideals Define America*
§ 1.6 *Common Law Reveals America's Character*
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§ 1.1
Threshold Matters

THIS book is an introduction; it leads the reader toward first principles of law and government obscured in lawlessness, the great danger facing individuals and nations. Lawlessness works its confusion first in the individual soul and then in the courts and government as men trust abstract logic to ascertain right behavior from wrong behavior, viz., law.[15] The growth and spread of American ideals of freedom, however, call for the American to hack through the overgrown tangle of lawless intellectualism to find, study, and ponder our tradition of common law and government until its first principles come clear. Upon seeing and accepting these principles, he will be willing to act upon them with words sharpened and loyalty quickened to the ideal that has defined America's

[15] "Depart from me," said Christ, "[namely] the ones working *lawlessness*." *Matthew* 7:23. Prior to the foregoing statement, *Matthew* 7:15–23 defines lawlessness using the plural subject (*οι εργαζομενοι την ανομιαν: the ones* working the lawlessness) and lawfulness using the singular subject (*ο ποιων το θελημα του πατρος: the one* doing the will of the Father). One's lawfulness is the result, never the meritorious cause, of eternal life: the divine purpose and natural fruit of the gift of salvation, never the root. Lawlessness, on the other hand, results from placing one's trust in the human mind as the source from which law springs. Christ puts lawfulness in the singular, because it is a direct and personal matter between the individual and his Creator.

destiny: the law of freedom.[16] This ideal embraces first principles arising from God's Word written; with this Word, our common-law tradition[17] is consonant.[18]

"Wherever the Scripture is known," wrote Miles Coverdale, "it reformeth all things, and setteth everything in order."[19] The Scriptures[20] have proven to be the leading cause in keeping our common-law tradition in good order, establishing it among our greatest blessings.[21] Our common law[22] is foremost an oral tradition of battle by trial and thus,

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[16] *See James* 1:25, wherein James calls it "the perfect [*τελειον: teleion*] law of freedom." *Telion* signifies the state of perfection, i.e., all the parts and potential are present.

[17] The writer uses *tradition* in two senses: an affirming sense to signify the Word of God written and those principles of law and government consonant with it; the negative sense to signify that which is antagonistic to God's Word: Babylonian religion, law, and government. In and out of Scripture, *παραδοσις* (*paradosis*: tradition) is neutral; context determines whether its import is good or evil, depending on the tradition's ultimate source: good, when referring to the tradition having originated in the mind of God, that is, as His Word reveals His thoughts (*see* 2 *Thessalonians* 2:15, 3:6); evil, when referring to the traditions originating in the minds of men, such as the Babylonian Mishna and Talmud. *See, e.g., Matthew* 15:2, 3, 6.

By the letters, the Greek noun *paradosis* (English, "tradition") denotes *the act* of handing over "records by the outgoing to the incoming *βιβλιοφυακες* [record keeper] and . . . treasure lists and inventories handed over by one set of officers to their successors." JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 483 (1930). Nowadays, *tradition* has come to signify that which one person hands over, in trust, to another.

Our courts adhere to the forms and processes of our common-law tradition as much out of custom as out of conviction. Regardless of the reasons, practice of common-law principles inures to our good. Without the conviction of divine faith—faith in God's faithfulness, according to Scripture—back of the practice of common-law principles, their practice will cease; freedom will fail. Right conviction results from a conscience informed aright, i.e., with truth: "Your Word," said Christ to the Father, "is truth." *John* 17:17.

[18] See generally § 4.10 of this book, for examples of the common law's accord with Scripture.

[19] Letter of 1 May 1527, from Coverdale to Cromwell, *in* COVERDALE'S REMAINS, at 490 (Parker Society, n.d.), *quoted in* 1 J.H. MERLE D'AUBIGNÉ, THE REFORMATION IN ENGLAND 349 (Edinburgh, Banner of Truth Trust 1977) (1853) (archaic spelling in original). Miles Coverdale, William Tyndale's fellow laborer, began his translation of the Bible into English in a kindred spirit to that of John Wyclif: in hope of establishing God's principles of government in the individual hearts and minds of his countrymen.

[20] Throughout this book, the singular *Scripture* and the plural *Scriptures* both denote the traditional Protestant collection of sixty-six writings: thirty-nine of the Old Testament and twenty-seven of the New Testament: these and no others with them, these and no more after them, constituting, as a unit, Holy Writ. The writer also uses *Bible*, *Word of God*, and *Word of Christ*.

[21] That the common law is among our greatest blessings is the opinion of many, including William Franklin Fratcher.

[22] After the year 1200, the English people called the Anglo-Saxon's tradition of law and government *common law*. Before that, the English used many other names for their legal tradition. To reduce confusion, however, the present writer often designates the common-law tradition—from its earliest known days to the present—with the "common law." When referring to any or all of the traditions of law and government retaining the foundations of

often harsh on the ears and messy in appearance. Though rough, it remains, nevertheless, ready and right headed, holding open channels through courts and government for truth to pass. By allowing delivery of right application of biblical principles to men in dispute, it has kept our freedoms in deed; thus, we have prospered. "Culture," says Van Til, "is religion externalized."[23] Our culture is our way of life, which has been the ongoing harvest of the sowing of Scripture,[24] a harvest of which the common law has had a steadfast part.

The common law has always recognized that God bestows His authority direct upon each of His people, who then exercise parts of that authority and entrust other parts of it to the separate offices of government, to be used according to the regular course of the common-law. This scriptural arranging of authority occurs first in the mind of the individual and then translates into personal behavior. Such individual behavior will form a critical mass[25] that can sway law and government away from abusing power and lording itself over people.

Justinian's *Corpus Juris Civilis*, he often uses *civil law*; when referring or alluding to Justinian's *Corpus Juris Civilis*, the he often uses "Roman civil law."

[23] One sees the inner desires of a country or nation in its religious forms and responses, practices of law and government, and economic policy. The forms and practices of both law and government arise from religious affections, whether right or wrong.

[24] In this book, the phrase *biblical faith* denotes the distinct faith of Scripture as distinguished from Babylon's counterfeit notions of faith, which have plagued men in two forms: faith that justifies the individual only as he adds his *meritorious* good deeds (self-righteousness); faith that justifies the sinner, but needs never bear the fruit of non-meritorious good deeds (antinomianism or lawlessness). By contrast, true biblical faith is that faith God uses to justify the sinner and that entails non-meritorious obedience, i.e., good deeds. The *Westminster Confession of Faith* accurately reflects the biblical teaching on this point: faith alone justifies, but this justifying faith inevitably and necessarily results in good deeds, viz., love, which is the filling of the law. *See Westminster Confession of Faith*, ch. XI. With the words of Christ—"If you love me, keep my commandments"—still ringing in his ears, John the apostle writes, "This is the love of God, that we keep His commandments." 1 *John* 5:2. *See also* 2 *John* 6.

In short, faith alone saves, said the reformers, but the faith that saves is never alone. Thus, in keeping with Scripture, biblical faith always entails good deeds. Counterfeit faith teaches that faith plus good deeds justifies the sinner; or that faith alone justifies the sinner but need not always produce good deeds. Christ alone is the justifier of the sinner, the gift of faith is the means, and good deeds toward God and others is God's desire for the one He justifies. Scripture often denotes *biblical faith*, using the definite article, "the faith": *της πιστεως* (*tays pisteos*). *See, e.g., Ephesians* 2:8–10.

[25] The critical mass necessary to persuade a country from wrong thinking to right thinking requires no majority. The force of truth in the hands the few shall rout lies in the hands of the many. "Victory, if gained," writes Justice Story, "is gained by battles fought: *not by the numbers, but by the forces brought . . .*" GEORGE ROSSMAN, ADVOCACY AND THE KING'S ENGLISH v (1960), *quoting* Justice Joseph Story. As amperage without the force of voltage is powerless, truth without the conviction of *the faith* delivers no victory. The conviction of biblical faith focused in Christ is the force that brings victory; all else amounts to "scattered fires end[ing] in smoke and noise, the scorn of men, the idle play of boys." *Id.*

This book builds observations and conclusions around a core of significant facts and events, bearing upon our common law. The book, however, details no examination of the finer substantive and procedural rules that the common law and the civil law have each built on their separate foundations. Such rules are important, but this book focuses on the basic differences between the two traditions.

The common law stands or falls on personal liberty of conscience—one's common sense of right from wrong and the freedom to act upon that sense—as one soaks his mind with Scripture. By contrast, the civil law rests on the imperial will of the state: the command of a man, or a combination of men, set forth in legislation and regulations, applied to all alike in unforgiving and ruthless precision. Thus, the controlling difference between the common law and the civil law, and the footing upon which the common law keeps going, is consonant with Scripture: God alone is LORD of the one's conscience.[26] Neither Scripture nor the common-law tradition offers the civil law's illusion of a safe harbor in one's obedience to the state. Each person will answer to God, and to God alone, for his actions.

For example, as a military commander, Joshua commanded, but as a magistrate, he saw that God alone is LORD of the personal conscience: "[Y]ou choose this day whom you will serve . . . but me and my house, we have committed to the LORD."[27] Our present age is as the days of Joshua, offering many gods by which come untold notions of false law and government, all leading to the same wrack and ruin of men and nations.

According to historian James Christian, the testimony of Scripture and of history shows that truth will transform a country only as it works through the conviction of the individual, not through any democratic consensus. Further, as the individual follows his conviction of truth, he, in time, will walk alone, stand alone, and alone he will hold the ground that God has allotted to him as steward and keeper. Nonetheless, the well-placed force of conviction of an individual, or a handful of individuals, will form catalysis enough to preserve and advance right and truth. Indeed, the testimony of history rings clear: truth and the critical mass ample to effect right resides in the minority, often in a small minority, or in a minority of only one. God gives His authority to His people individually and directly, through His Word, by the illumination of God the Holy Spirit—and with God's authority comes God's conviction.

During the decade of 1960–1970, American farmers and ranchers learned that their control of 10% of the production of a farm commodity enabled their control of the market price of that commodity: the dollar value that the country places on that commodity. Likewise, the conviction of a 10% minority concerning a particular matter can determine the value that the country places upon that matter.

[26] See generally § 3.7.11 of this book (discussing the worth of the work of the Westminster Assembly).

[27] *Joshua* 24:15. Though Joshua cited Israel's worship of many false gods while in the Land of Canaan, in the wilderness, and in Egypt—such are the many ways of death (*see Proverbs* 14:12, 16:25)—, Joshua saw only two basic choices: bondage to a false god, or many false gods, (polytheism) or loyalty to the one true God.

All such notions have arisen from the confusion of Babylon, the mother and the cradle of civil law and government—still called *civilization*.

Americans can realize the benefits of the common-law tradition only as each American—whether serving as juror, magistrate, judge, legislator, executive, administrator, police officer, prosecutor, soldier, or sailor—yields his conscience captive to God alone by His Word written and not to the state, i.e., other men. Such captivity is a matter of personal yielding and loyalty to two quests: to fill one's common sense with Scripture and to obey and defend human articulations and applications of law that are in accord with the written Word of God.[28]

Every human choice begs judgment between good or bad, right or wrong, better or best; as such, human choice needs standards whereby to measure choices, i.e., law. The common law's rudimentary precepts and processes accord with God's Word written; where deviation occurs, the common-law provides opportunity through due process and guidance by first principles for correction. Because the common-law follows the surefootedness of fact as opposed to speculation—testing all things against not only reason, but against the facts, the senses, and reasonableness—it allows the best opportunity for God's standards to cross the chasm between divine ideals and the particular working out of those ideals. The common-law tradition still offers the process through which scriptural principles can flow into the activities our law and government, to the good of all.

Scripture acknowledges that God uses all men to work His purposes; thus, all are fit to take part in the common-law tradition. It remains, however, the personal and non-delegable duty of God's man to build God's Word into the fabric of his nation's consciousness, one person at a time, enlivening the common-law tradition.[29] The common law rests not upon superior education, learning, genius of the human mind, or even human goodness; but relies, instead, upon the *capability*—impressed

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[28] At times, the writer uses *the Word of God written* to distinguish a related and complimentary concept: the Word of God unwritten (the living Word, which is Christ). When the writer uses *the Word of God*, he refers to both the written and the unwritten Word. The language and terms used by both the Old and the New Testaments allow the foregoing distinction.

[29] Martin Luther once said that he would sooner have a smart Turk (an infidel) for a ruler than an ignorant Christian. Any person participating in government—Christian or infidel—that is ignorant of proper forms and administration of law and government will bring trouble on himself and his country at least to the degree of that ignorance. Churches and church leaders that follow the civil-law model in church government—viz., a government of one man—foster a perilous attitude concerning local, state, and national government. Law and government practiced aright in the county courthouse and in the state house results from biblical standards practiced in the visible church.

into the natural being, the soul, the common senses of every person,[30] as set forth in *Romans* 2:14–15—to recognize right[31] and wrong behavior.

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[30] A *right* understanding of the doctrine of man in his fallen condition is necessary to pursue right government intelligently and completely. *See generally* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 11–30 (1974) (presenting Scripture's teaching concerning man in his fallen condition for a threshold consideration to fully understanding right *human* government). See the following note of this book for the author's use of the otherwise hackneyed word *right*.

Scripture teaches that when Adam fell into disobedience, he plunged himself and his descendants, seminally and spiritually, into sin, thereby rendering unreliable the entire being—body, soul, and spirit; mind, will, and emotions—of each member of Adam's race to apply the truth of the law *to himself*. *See Romans* 5:12. That the law applies with equal force to those charged with dispensing the law's application and force—*e.g.*, legislators, judges, and magistrates—is a fundamental principle of the common law, quickened and upheld by a conviction among the people of a country as much as by any self-discipline of government officials and magistrates.

By contrast, the basic error of the Roman tradition of religion, law, and government stemming from Babylon, teaches that though Adam sinned, he avoided any fatal taint of depravity of the *mind*. Therefore—or so Rome's scholastic doctors' argue—, each of Adam's descendants are justified in relying upon his mind, or the mind of another or others, as the fountain of law, the final standard by which to discern right from wrong in application of the law. To rely on the human mind, however, is to trust in the frailties of humanity—wound up and bound up in his own weaknesses, whims, and difficulties—instead of God.

Consonant with biblical teaching, the common-law tradition is unwilling to trust the mind of man and, therefore, seeks the fountain of law in the eternal principles. Therefore, common-law courts call their conclusions *findings*, as of an objective standard. By contrast, in keeping with Babylonian doctrine, the civil-law tradition places ultimate trust in human reason by seeking a purely subjective source of law in the mortal mind of man. Therefore, the civil-law judges call their decisions *decrees*, as of a subjective standard. Although modern common-law courts, having subsumed equity jurisdiction, retain the term *decree* when sitting in equity, the concept behind the common-law courts' use of this term remains *finding*. Civil-law legislators decree; common-law courts make findings.

[31] Though *right* is a hackneyed word, its biblical understanding is nonetheless necessary to genuine discussions of truth. For purposes of this book, *right* denotes those expressions and actions consonant with the Creator's character and will as expressed by His Eternal Word. *Right* derives from the old Anglo-Saxon root *riht*, meaning to put in direct order and proper alignment; modern English retains this meaning. The Anglo-Saxons used Volk-*riht* to signify their tradition of law and government, which Englishmen later called the common law. To the Anglo-Saxon, "law" or *riht* comprised the unchanging eternal principles, which he must discover and to which he must always align his understanding and behavior in order to survive and prosper. Right is authority, which has its source only in God; thus, one's rights are God-given. It is absurd, therefore, to hold that God gives a right, such as the right of conscience, to one man; while He gives to another man in government the right to deny that man's right of conscience. Such God-bestowed rights are beyond the lawful reach of government.

A further distinction is needful between rights God bestows direct upon each every person and authority from God that reaches the individual by indirect means through human delegation. Those rights God bestows direct and without exception upon each of Adam's descendants, no man can take because no man gave them. That authority from God, however, that reaches the individual by indirect means through human delegation, man can take back because man delegated the authority.

At English common law, "right" is that which one asserts against an encroaching government, calling such a request to bring an action against the sovereign a *petition of right*, because government authority ends where the fundamental (God-given) right of the

Called *natural law*, this capability is more precisely the natural *ability* of every person to recognize truth, once he sees it, even if he refuses to apply it to himself. "[T]he eternal Father of Light and Fountain of all Knowledge," writes John Locke, "communicates to Mankind that Portion of Truth which He has laid within Reach of their natural Faculties."[32] Locke is careful; he does not say that every person knows the truth, but rather, that God has laid such knowledge within the reach of all. This fellowship of ability in every person justifies the common-law Jury and according to this ability, the common-law juror can function.

Moreover, the genius of the common-law tradition is its adversarial character. Thus, it does not require angels to make it work to our good, but rather, each seeking his own lawful interests, by the channels of lawful process.[33] Instead of chasing the fantasy of the civil-law tradition's utopia on earth, where men cease from selfishness and rulers are benevolent, the common law thrives by recognizing the worth of rivalry, and the unavoidable conflicts and clashes of selfish ambition—kept within the bounds of fair play. In a word, the common law depends on sharpened conflict between parties seeking their own interest, as they clash in the courts and in government, to begat truth. From this adversarial setting, the common law has emerged; in this setting, it thrives.

The experience of American unity and the resulting wealth and might she has wielded for good, has come about because the fair play, first principles. Indeed, the processes of our common-law tradition have reached into every county in every American state, making the same pursuit of fair play in justice available to all. The common-law principles and processes are consonant with Scripture, resting upon our freedom to choose lawful relationships free from state meddling. Moreover, protection of personal relationships is the basis and reason for the common-law tradition. One's freedom to choose, to enter, and to foster one's relationships is vital to one's freedom. In short, personal freedom is a function of freedom of association.[34] To know the kinds of relationships

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individual begins. The state is without authority to encroach upon one's God-given rights and responsibilities. Thus, if the House of Lords gives its advice and consent to the Crown to allow a plaintiff's's action against the Crown, the attorney general gives that consent with the words, "Let *right* be done": a common-law expression of the limited sovereignty of government yielding to the unlimited sovereignty of God over the individual's right, conscience, and obedience to law.

[32] Capital letters in original.

[33] Adam Smith called the natural drive of each individual to seek his own interest the invisible guiding hand of God among human affairs.

[34] *See* U.S. CONST. amend. I.

the common-law recognizes enables defense of personal rights.[35] Rights in property and property in rights arise out of relationships. Protection of freedom of association and relationships is protection of personal rights.

§ 1.2
Worth of Legal History

Conscience, Madam, requires knowledge,
but of right knowledge, I fear you have none.
History presented in truth rightly informs the conscience;
the conscience, then, can motivate to right action. For history to
be of value it must be truth, not fancy: history revised to satisfy one's desires.
Just as motivation to right action depends on conscience rightly informed,
conscience wrongly informed leads to wrong action . . .
Your will, Madam, is no reason . . . .[36]

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[35] See generally § 5.3.3 of this book (identifying and discussing, in addition to the tacit relationships involved in tort law, the four fundamental relationships—property, contract, agency, and trust—constituting facets of the common-law tradition). Common law, consonant with the biblical pattern, provides right definition and understanding of relationships; out of the individual's right understanding of his relationship with God and his relationships with other men, right understanding of all else arises. Thus, the common-law holds private relationships sacred, demanding that the courts protect the sanctity of relationships freely entered, whether these are the covenants between the individual and God or between one man and another.

For example, in protection of the "utmost liberty of contract" as a voluntary establishment of a relationship, the Illinois Supreme Court affirms the sacredness of private covenants of trust and of contract:

> [I]f the rules of law and the terms of the trust conflict, the terms of the trust shall control unless it is clearly for an illegal purpose. Courts must act with care in extending those rules which say that a given contract is void because it is against public policy, since if there be anything more than any other which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts shall be held sacred, when entered into fairly and voluntarily.

Schumann-Heink v. Folsom, 328 Ill. 321; 159 N.E. 250 (1927). See also generally § 3.4 of this book (discussing the Anglo-Danes contribution to re-quickening the common law's strong tendency to protect private relationships).

[36] This is a part of John Knox's unforgettable response to Mary Queen of Scots, during his meeting with her, while Knox was under condemnation of outlawry. See generally § 4.9 of this book (explaining outlawry). Young Mary, meeting with Knox at Hollyrood Castle in tears, had whined to him, "I perceive that my subjects shall obey you, and not me. They shall do what they list, and not what I command; and so must I be subject to them, and not they to me." Then, after rebuke from Knox, she informed him, "My conscience is not so," whereupon Knox delivered the above quoted response. JOHN KNOX, HISTORY OF THE REFORMATION OF RELIGION WITHIN THE REALM OF SCOTLAND (C.J. Guthrie, Q.C., ed., n.d.), *quoted by Center for Reformed Theology and Apologetics* (visited 26 Sept. 2007) <www.reformed.com> (first italics added).

To ignore the law's history[37] is to remain ignorant of the law's source and purposes, which reveal the law's Author. "A lawyer without history . . . ," said Sir Walter Scott, "is a mechanic."[38] Historian Allan Beason asks, "Should history be ignored?" What does one care about the doings of others bygone, long-since buried? Indeed, any presentation of history that merely pulls apart and examines the dry bones of the dead is worse than worthless—it is morbid. God acts through the faith, hope, and passion of men; His prerogative in so doing is His glory. To remain ignorant of men's past deeds, however, is to surrender the future to their failings.

The common law arose from obscure circumstances and struggled for centuries in the face of overwhelming odds against rigorous Roman attempts—by slight of words and force, intrigue and rebellion—to undermine and replace it. Nevertheless, over time, the common law has overcome, bringing extra ordinary freedom and productivity that spills over to the good of the entire globe; Scripture urges us to hone our

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[37] English takes its word *history* from the Greek noun *'ιστορια* (*historia*), which derives from the verb *'ιστορεω* (*historeo*). The verb form signified the method of one's investigation into how those in times past made the record of the events they witnessed; the noun form referred to a recounting of that which one had discovered by these investigations.

As first used by the Attic Greeks, the verb form signified learning first hand by traveling to other places and visiting with persons in these places in order to investigate by both inspection and inquiry. In a word, it denoted the activities of one seeking greater confidence in one's understanding of past events by confirming the reliability of the record of those events. For example, in *Galatians* 1:18, Paul used the verb form in the aorist infinitive (*'ιστορησαι: historaysai*) to describe his interview of Peter in Jerusalem. "Like any true historian, he [Paul] sought to learn about Christianity by a process of inquiry." ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 13 (1974).

The English translation of *historaysai* in *Galatians* 1:18, "to see," is weak. Jerome's Vulgate has *videre*: to see with the eyes or perceive with the mind, or both, i.e., to look (inquire) into a matter. *Videre* is a fair equivalent of *historaysai*, but some suggest that the Latin *specto* better captures *historaysai*, Paul's term here. At bottom, Paul, realizing that the Christian faith rested upon certain facts of history—viz., the life, death, burial, and resurrection of Christ—determined to further confirm his confidence in the record of these events by interviewing an eyewitness of these events, Peter the apostle.

In later centuries, the Greek dialects used *ιστορικος* (*historikos*) to denote the product of one's research of historical records. The English word "history" carries this meaning foremost; but at times, the historian also reveals the process of inquiry or investigation he has followed in order to alert his reader to the strength or weakness of his conclusions. The English term "history," however, differs from the German noun *geschichte* (from the verb *geschehen*), which means: "to happen," signifying an event rather than either the process of the event or the result of its occurrence. *See id.*

[38] To realize the greatest benefit from history, one must approach history with ascription of all creation to God and with acceptance of the reasons set forth in the early chapters in God's Word for the necessity of human government. Scripture sets forth both God's creation and the reasons for human government in the context of history. *See generally* HERBERT BUTTERFIELD, CHRISTIANITY AND HISTORY (1950) (presenting a biblical understanding of history).

senses, delve into history, and find the reasons. To know only the present is to see only the result; to know past is to know the causes, which reveals God's life-giving hand.

Some read and teach history foremost for its cultural worth: culture for culture's sake. In so doing, however, history is no more than nostalgia. But history, known and used aright, delivers from danger and offers wisdom for living. In a word, to cultivate an understanding of the common law's past brings confidence of its authority and understanding of its power for good in the present.

Before herbicide became available, farmers spent untold hours cultivating weeds from cornfields. Cultivating rows of tiny, tender corn plants was slow moving, monotonous, dusty, and tedious. It demanded the farmer's close and unflagging concentration—lest he allow a cultivator shovel to swing a hair too close to the row and push dirt over the tender plants, covering them, or even ploughing them out. To suggest that farmers cultivated corn plants only for the sake of cultivation is absurd. Crops are worthy of cultivation because by this work the farmer reaps his harvest.

In like sense, the history of our common-law tradition is worthy of study for the good it can yield. Cultivating an understanding of the common law has practical down-to-earth worth; therefore, cultivate the weeds from it expecting better yields. The common law encourages productivity because it safeguards relationships freely entered and holds open the free market of competition for truth. Where the individual freely declares truth, it will overcome its rivals, clearing the field—in the home, in the Church, in the market place, in the courts, and in government—; where truth prevails in the lives of men, material blessings follow. In a word, truth releases men and women into personal peace and productivity.

Cultivate the common law in hope of a good harvest.[39] To learn and then to use[40] the lessons gained from the history of the common law is to understand its elements in confidence of at least four benefits.

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[39] Justice Coke draws a lively analogy from the law of specific gravity to demonstrate the experience of learning the common law. Coke's reference to *law* is a still-used abbreviation for the common law:

> [T]he knowledge of the [common] law is like a deepe well, out of which each man draws according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law . . . And as the bucket in the depth is easily drawn to the uppermost part of the water (for *nullum elementum in suo proprio loco est grave*) [nothing is heavy located in its own element], but take it from the water, it cannot but be drawn up but with great difficulty; so

First, only by delving into the experiences of history can one find the footings of the common-law standards, which are its purposes, its reasons for being, and the base upon which its precepts stand. Moreover, the reasons behind the common law never came about in a moral vacuum. Men have discovered and shaped the common law, not out of relaxed contemplations of social theory and logic, while secluded in the cloister or scriptorium of the academy, monastery, or university; but out of enlivened conflict over facts and personal rights, fired in the crucible by moral conviction over wrongs done, and clashing in the open daylight of the adversarial process.

For example, if one desires to know what moral wrongs King John perpetrated during his reign, one need only to read what Magna Carta demands and forbids. Thus, not only does the study of history reveal the common law; the study of the law also reveals history.[41] Using these keys of historical experience, the mechanisms of the locks to understanding the common law's principles will draw back the bolt, allowing opening of

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> albeit beginnings of the study seem difficult, yet when the professor of the law dive into the depth, it is delightfull easie and without any heavy burthen so long as he keep himself in his proper element.

Quoted in JOHN C.H. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 31 (1955) (archaic spelling in original). As drawing water out of a well, obtaining knowledge and understanding, though hard work is doable. Knowing this principle, Paul admonishes his student Timothy, "Study [*σπουδαζω* (*spoudadzo*): the verb form's suffix *−αζω* (*adzo*) signifies intensity; in this case steadfast zeal and sweat] . . . properly aligning the word of truth." 2 *Timothy* 2:15. *See* BRENT ALLAN WINTERS, GOD'S MEASURE OF INTELLIGENCE, at ch. (1999) 6 (further expositing this verse).

[40] Flowers without fruit are vanity; study without utility is futility. "Utility ought to be the principal intention of every publication. Wherever this intention does not plainly appear, neither the books nor their authors have the smallest claim to the approbation of mankind." 1 BY A SOCIETY OF GENTLEMEN IN SCOTLAND, *Preface to* ENCYCLOPÆDIA BRITANNICA (1st ed. Edinburgh, A. Bell and MacFracware 1771). In 1771, A. Bell and C. MacFracware of Edinburgh published, in three volumes, the first edition of Encyclopædia Britannica—produced, the *Preface* states, "[b]y a Society of Gentlemen in Scotland." Following this first edition, the authors and editors researched and published the 10 following editions pursuant to the belief that all facts discovered and right conclusions drawn are harmonious with all other truth, forming a unity of knowledge. See generally app. 3 of this book (expounding אחד: '*echadth*, the Hebrew term for unity as one-*ness* in the consistency and integrity of the created order). According to the publishers, they best achieved this ideal in 1910 with publication of the eleventh edition.

[41] That law reveals history and history reveals law, not all agree. For example, the Supreme Court stated, "[T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment." United States v. Leon, 468 U.S. 897 (1984). To say, however, that no such evidence exits, demands omniscience. In addition, that the Framers included the Fourth Amendment in the Constitution more than suggests that history before ratification of the Fourth Amendment shows that judges and magistrates are inclined to ignore and subvert rights of privacy by allowing unlawful searches and seizures. Moreover, history is replete; present experience further confirms.

the door to more understanding. Without history, attempts to unlock the door to truth are as the groping of coarse implements instead of the key mated to the lock.

Second, grounding in legal history increases one's ability to foresee the common law's expanding application. With each new legal conflict being unique in some way, court findings are, at best, informed choices. Knowledge of how conventions of law and government have worked in the past, and how courts have shaped law's expression and application in light of fresh conditions and circumstances, reveals the trend of law's application and aids in forecasting the response of a court in a new case. In addition, knowledge of legal history enhances deft sense of legislative and judicial trends. In a word, history gives guidance, enabling right application of the timeless principles to new circumstances. The common law is an ongoing refinement of law's unchanging principles. Knowing history demonstrates the constancy of these rudiments and anchors the understanding. Thus one can avoid the confusion and the heartache that comes from drifting into seas of subjectivity.

Third, familiarity with past forfeiting of common-law safeguards and freedoms enables one to recognize and counter future danger and enhances the importance of due process, the foremost of the common law's first principles, which stress fair play, allowing hard blows but never foul ones. As the farmer hopes for the harvest by focusing on tending his crop and in patience conforms to the laws of the harvest, such as the seasons and weather; so also, only by focusing on and conforming to the ways of due process will one gather the good harvest of the common law.

The best opportunity for a fitting and fair result is by holding fast to the common law's process. Due process is the necessary thing—as the inside of the cup in Christ's example, if the process (the inside of the cup) is kept clean, the result (the outside of the cup) will be clean also.[42] Put

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[42] *See Matthew* 23:25–26. Here Christ highlights the abuse of legal process used to plunder the innocent: neglect of proper and due process for lustful gain. *See* FLOYD V. FILSON, THE GOSPEL ACCORDING TO ST. MATTHEW (1971), *cited in* LINGUISTIC KEY TO THE GREEK NEW TESTAMENT 68 (Fritz Rienecker trans., Cleon Rogers ed., Zondervan 1982), *originally published as* SPRACHLICHER SCHLUESSEL ZUM GRIECHISCHEN NEUEN TESTAMENT (Brunnen-Verlag, Gissen 1970). *But see* 3 DICTIONARY OF NEW TESTAMENT THEOLOGY 603–05 (Colin Brown ed., n. trans. 1978), *originally published in Germany under the title* THEOLOGISCHES BEGRIFFSLEXIKON ZUM NEUEN TESTAMENT (1971).

Because *αρπαγη* (*arpagay*), Christ's term here, connotes violent means, during the early centuries after Christ's birth, plaintiffs used it in Roman legal petitions complaining of robbery by violent means, by extortion, a direct playing upon fears: i.e., by force or threat of force. *See Griechische Papryus zu Strassburg* I, II (F. Preisigke ed., Leipzig 1912–1920), *cited in* JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW

another way, due process is the wisdom of the common law; by getting due process—notice of the time and place of hearing and a meaningful opportunity to be heard—comes understanding. Men will achieve justice only by observing fair process; any result obtained by violating fair play is, in and of itself, unworthy of our confidence.

Common law in general and due process in particular is not a list of laws, such as is legislation: statutes and regulations frozen in time intended to produce a decreed result. It is, instead, the accretions of law's applications, case by case, gathered over time by adhering to the processes of fair play.

Fourth, one's grounding in legal history increases one's ability to act wisely within common-law first principles,[43] enabling refinement of the common law by evermore-acute application of its principles. The one

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TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 79 (1930). In the context of this passage, the term *arpagay* signifies the machinations by which lawyers—*γραμματευς* (*grammateus*), also called *νομικοι* (*vomikoi*) and *νομοδιδασκαλοι* (*nomodidaskaloi*)—and judges achieve theft: the lawless taking of another's property.

The Old Testament calls these lawyers סופרים (*sopherim*: literally and originally, the persnickety "counters" of the individual letters of the Hebrew alphabet in a newly copied Old Testament book in order to certify the copy's accuracy and fitness for reading). The threat of lawyers and judges is not any direct violence these men direct at others, but the indirect violence they construct against others through abuse of the courts and legal process. For these reasons, it is the responsibility of all to insist, above all things, upon the observance of common-law due process. It is not the litigants', but the court's responsibility to judge the case at hand; it is the responsibility of all, however, to insist upon fair conduct of the contest (fair play) with a view toward substantial justice.

[43] *See generally* 34 J. LEGAL EDUCA. 222 (1984) (arguing that the study and teaching of law is rightly compared to Mark Twain's description of riverboat piloting in his book *Life on the Mississippi*). A fair bit of navigational freedom of choice exists between the riverbanks but never beyond them. Judge Joseph Neilson also finds analogy between the common law and the river:

> We stand by the river and admire the great body of water flowing so sweetly on; could you trace it back to its source, you might find a mere rivulet, but meandering on, joined by other streams and by secret springs, and fed by the rains and dews of heaven, it gathers volume and force, makes its way through the gorges of the mountains, plows, widens and deepens its channel through the provinces, and attains its present majesty. Thus it is that our truest systems of science had small beginnings, gradual and countless contributions, and finally took their place in use, as each of you, from helpless childhood and feeble boyhood, have grown to your present strength and maturity. No such system could be born in a day. It was not as when nature in fitful pulsations of her strength suddenly lifted the land into mountain ranges, but rather, as with small accretions, gathered in during countless years, she builds her islands in the seas.

A COLLECTION OF ARGUMENTS AND SPEECHES BY EMINENT LAWYERS [n.p.] (New York; Baker, Voorhis & Co. 1882).

retaining a lawyer, or representing himself, with a conviction regarding the application of a certain legal principle, helps the discovery, articulation, and furtherance of the common law.

In sum, those familiar with timeless legal principles and their expression through history are better able to fashion fitting applications to perennial human problems as these evermore bob forth from new relationships. It is indispensable to our freedoms that each application of law sets square upon the common law's distinct foundations of method and procedure, viz., due process.

Bede, the father of English history, offers an additional justification for the study of history:

> For if history records good things of good men, the thoughtful hearer is encouraged to imitate what is good: or if it records evil of wicked men, the good, religious listener or reader is encouraged to avoid all that is sinful and perverse, and to follow what he knows to be good and pleasing to God.[44]

The civil law arose from the ashes of the old Roman Empire and added to its emperor worship the cloak of nominal Christianity. By the tenth century, the imperial Roman Church had become the chief carrier of the old Roman Empire's civil-law tradition; the visible trappings and ceremony of its religious-political doctrines, though deceitful, lent an air of intimidation, respectability, and prestige. Thus, by the canon law, ancient Rome's civil law persisted, not only in its continental presence but also by its tentacles—reaching, groping, grasping throughout the world.

By the seventh century, Roman law again reached into Britain. This time, however, not by Rome's legions but by Rome's priesthood. Thus began in earnest the struggle between the common law and the civil law, between the Scriptures and Justinian's Code. That struggle came to dominate, define, and determine the history of Britain, her colonies, North America, and the United States.

In Britain, history wove God's Word with law and government. As a woven garment depends upon the interplay of warp and woof for its overall appearance, a whole picture of England's character depends upon

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[44] BEDE, A HISTORY OF THE ENGLISH CHURCH AND PEOPLE 33 (Leo Sherly-Price trans., Edinburgh, R. & R. Clark Ltd. 1955) (A.D. 731). See generally 1 BEDE, HISTORIA ECCLESIASTICA GENTIS ANGLORUM *Preface* (Charles Plummer ed., Oxford 1896), for an alternative translation.

the interplay of both the history of law and government in England and the history of Scripture throughout the entire Isle of Britain, and parts of Ireland; these together conceived the United States.

Put another way, the struggle between the common law and the civil law in Britain, defined the features and formed the character of England's law and government. Moreover, any attempt to understand Anglo-American common law and government without learning something of the history of biblical thought in Britain is futile. Indeed, those who forged the common law into its present shape understood its precepts not only in light of Scripture but also as a function of Scripture.

§ 1.3
Common Law:
Every Man's Law

All I need to try your case is the facts. Don't worry about the statute; give me the facts. The facts don't lie. I can win on the facts.[45]

The common-law tradition stresses facts because it rests for its findings upon a consensus of the common sense of twelve jurors on the facts. Indeed, the first step in finding applicable law is to discern relevant facts: the ore from which one can pan out truth. Though facts can be manipulated, misunderstood, and misapplied, facts are, nonetheless, truth. Legislation, however, may or may not express truth. Where legislation is the goal and preoccupation of the courts, due process, protection of personal relationships, and facts recede from consideration. Thus, some legislator's pet legal theory, instead of the relevant facts, can control the outcome of the case.[46]

The common-law is not a tradition of the scholar. It has never arisen, nor does it now arise, from the academic contemplations of university doctors. Thus, the common law is not a tradition of positive law: *e.g.*, legislation.[47] Neither scholars nor legislators are omniscient; common law eschews legislation that disregards the peculiar facts of a case. Unlike the civil law, which honors foremost legislation as the will of the state,

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[45] The writer overheard this comment from a Boone County, Missouri defense lawyer to his client in the Boone County courthouse.

[46] The fundamental concern of the common-law tradition is vindication of freedom: the protection of private relationships—freely entered unilateral relationships (*e.g.*, parents and children), freely entered bilateral relationships (*e.g.*, contracts), and other divinely ordered relationships (*e.g.*, between siblings). By contrast, the fundamental policy of the civil-law tradition is vindication of the dominating will of the state.

[47] See generally § 5.1.4.4 of this book (showing the inherent dangers of legislation).

the common law stresses the facts of the case at hand, in confidence that the Jury will discern right from wrong by learning the truth of the facts.

The common law's core reason for a trial is to determine the facts of the case so that the court will know which standard of law to apply. Thus, the common law never stresses abstract reason, but tries the case to determine the facts. The civil law, by contrast, believing it already has the applicable law in the Code, has little interest in the facts and, therefore, holds no trial. In short, in the common-law tradition, facts control; in the civil-law tradition, the Code controls. The facts are within the grasp and understanding of every man—unlike the university scholar's civil-law Code and the scholastic method behind it—; thus, the common law is the law for every person:

> Remember that a trial, especially in a criminal court, is more of a fact suit than a lawsuit. The troublesome problem confronting the court and jury is not so much what *the law is*, *as what happened*. Did he steal? Did he assault? Did he commit arson? Did he kill, and under what circumstances?[48]

The life of the common law is truth, which is facts, and the discipline to follow the due process required to bring them to light.[49]

Familiarity with our common law is necessary to the keeping of our traditions of personal freedom and political liberty.[50] Though "more

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[48] LLOYD PAUL STRYKER, THE ART OF ADVOCACY 216 (1954), *quoting* Quentin Reynolds (emphasis in original).

[49] To be sure, the life of the common law is not logic, but neither is it the *experience* Holmes identifies: "[t]he felt necessities of the times, the prevalent moral and political theories, intuitions of public policy . . . [and] . . . the prejudices which judges share with their fellow men . . . ." OLIVER WENDALL HOLMES, THE COMMON LAW 1 (1881). To be sure, these find their way into the mix, but just as often tend to weaken the life of the common law more than strengthen it. A court ["d]ecision," says Justice Stone, "[draws] its inspiration and its strength from the very facts which frame the issues for decision." Harlan Fiske Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 6 (1936)

[50] For example, the Constitution is our lawful outline for common-law government; but without widespread understanding of its entailments, practical liberty will fail. Understanding the Constitution is "the business of every intelligent citizen; for as I have explained," says Justice Scalia, "if the people misunderstand the nature of the Constitution, and the role of the courts in its enforcement, the enterprise cannot succeed." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, The Tanner Lectures on Human Values Delivered at Princeton University (8–9 Mar. 1995).

Taken at face value, Justice Scalia's words are good admonition. By the foregoing, however, Justice Scalia means that the Constitution be understood according to him. Ignoring that the essence of the Constitution is the common-law, he drains it of its blood:

generally talked of, than thoroughly understood,"[51] it is necessary that all know and ponder the freedoms of the common law. Just as biblical truth is open and meant for all, the common-law tradition holds its principles available to all, abhoring the secret knowledge of priestcraft[52] and the fawning trust it demands. The common-law never reserves knowledge of its first principles for attorneys only.[53]

Scripture teaches that the Spirit of Christ brings freedom from sin and guilt. Since the earliest days of humanity, through the Roman Empire and to the present, God's people have experienced this personal freedom, but never saw the fruit it can yield as richly as has those of the United States.[54] At the crucial moments of our colonial beginnings, personal

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> [I]n the federal courts, where, with a qualification so small it does not bear mentioning, *there is no such thing as common la*w. Every issue of law I resolve as a federal judge is an interpretation of text—the text of a regulation, or of a statute, or of the Constitution.

Id. at 88 (emphasis added). To the contrary, the heart and spirit of the common-law tradition are its methods of due process and separation of powers; cases that require the finding of the meaning of a statute still require common-law, not civil-law, fundamentals. If, for example, the federal courts ignore the common-law rights of trial by jury, due process, they deny that which gives to them their jurisdiction: the Constitution.

Justice Scalia proposes that because he spends most of his time interpreting statutes and regulations, he must abandon his role as a common-law judge. The essence of the common law, however, remains in its manner and ways, even when interpreting statutes; by these, it distinguishes itself. Common-law judges interpret statutes and regulations in judicial independence and according to common-law first principles; civil-law judges enforce statutes according to the will of the legislator and regulations according to the will of the promulgator—whether or not lawful.

[51] 1 BLACKSTONE, *supra* note 12, at 140.

[52] As had the reformers before them, America's Founders discerned the struggle for liberty to be against priestly power. In 1813, Thomas Jefferson wrote to Alexander von Humbolt, "History, I believe, furnishes no example of a priest-ridden people maintaining a free civil government. This marks the lowest grade of ignorance of which their civil as well as religious leaders will always avail themselves for heir own purposes." The following year he wrote to Horatio G. Spafford, "In every country and in every age, the priest has been hostile to liberty. He is always in alliance with the despot, abetting his abuses in return for protection to his own."

[53] An old Norman-French word, *attorney* denotes one clothed with authority to act on behalf of another, called his principle, binding his principle to obligations enforceable in a court. An attorney then is an *agent*, called attorney in fact, or, if representing another before a court, attorney at law. An attorney's relationship to his principle is, in kind, an agency relationship, which demands undivided loyalty (anything less is disloyalty) of the agent to his principle, limited only by the majesty of the law. Whether an attorney in fact or an attorney at law, a pressing question for any agent desiring to know the limit of his loyalty is, what is the true law applicable to the demands of his agency?

[54] In most countries that experienced the Christian Reformation, history identifies the Reformation with a single personality, but not in England. Two salient features distinguish the Reformation in England from the Reformation in other lands. First, history does not attribute it to God's use of any single personality such as Luther in Saxony, Calvin in Geneva, Zwingli in Zurich, or Knox in Scotland; but rather, attributes it to a number of personalities—including the four aforementioned men, with Knox having a direct hand as a

Christian freedom reached a critical mass, entrusting our country to common law. In sum, in order to experience the benefits of the common-law tradition renewed affinity for, and knowledge of, the common-law's rudiments must become the hankering of many and not only lawyers.

§ 1.4
Common Law:
A Tradition of First Principles

A child says, "It's my toy." That's property law . . . A child says, "You promised me." That's contract law. A child says, "He hit me first." That's criminal law. A child says, "Daddy said I could." That's constitutional law.[55]

During the fifth century, the original design of a liberal arts education was to prepare the student for the responsibilities of Christian liberty.[56] It was, therefore, an education for liberty, in the arts of liberty (*artes liberals*), for those freed from sin's bondage; as opposed to training designed to condition a person to function in the arts of bondage or servitude (*artes serviles*), i.e., as a slave. Further, the arts of liberty boiled down to the deftness with which one can receive and communicate one's thoughts, measured by one's skill with the four arts of language: reading, writing, listening, speaking, and—the natural activity attending these—thinking. To these, a true liberal education seeks to inform the

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father of the English Church—impelled through their experience with the translation and publication of God's Word in English. Second, this publication not only propagated the truth of the gospel; but by doing so, it also reinforced principles of common-law government already in place.

Because the Reformation on the European continent was of the Church only, the state continued to practice civil-law theories; thus, the Church remained under the state's civil law. By contrast, the Reformation in England was of the Church and the government: God's Word replaced Rome's canon law (*Corpus Juris Canonci*) as the Church's authority; by the seventeenth century, England reconfirmed the common law's limited monarchy, decisively defeating the absolute monarchy theory of the civil-law Code (*Corpus Juris Civilis*).

Though the Reformation in Scotland and the Reformation in England are distinguishable, the two wove together due to their common island home, common government, common tongue, and common translations of the Scriptures. Though the Reformation in Scotland was foremost of the Church and the Reformation in England was of both the Church and the government, the Reformation in Scotland and the Reformation in England each had a decisive effect upon the other. During Parliament's seventeenth-century struggle against the royalists, the two fused; then, during the American Colonies' eighteenth-century struggle against Parliament, the two amalgamated.

[55] Harold Joseph Berman. Like all children, Berman once said, I had been a law student from a young age. Berman taught at Harvard Law School from 1948 to 1985, then at Emory Law School from 1985 to 2006.

[56] *See generally* WINTERS, *supra* note 39 (discussing liberal education as set forth in Scripture and the early Church).

conscience aright with the mind of God, using the righteous sentences of His Word written. Thus, the mind, heart, and soul, and responses of the man with a liberal education are informed with Scripture, and he can speak and write most of what he thinks and can understand most of what he hears and reads.

For centuries, the phrase *liberal education* betokened a scholastic education: that is, designed to indoctrinate the initiate into use of abstract logic to justify the *powers that be*, qualifying him to make decisions for the un-indoctrinated. Still today, the civil-law world understands a liberal education this way. On the contrary, however, a true liberal education imparts the tools helpful and the discipline necessary to sharpen personal discretion, the highest responsibility of a freeman.

For centuries, and still nowadays, the traditional scholastic education touts itself as a liberal education aimed at using the civil-law Code and its scholastic methods to justify the continuation of the present state of affairs (status quo) in law and government. By contrast, wise discretion, requiring more than pure reason, engages one's affections, convictions, and volition. Liberty enables one's independent exercise of discretion guided by one's conscience informed aright; bondage demands trained responses to commands. As a practical matter, an education in the arts of liberty enables a fellow to think at least halfway into the field of the expert sitting opposite and to act in wisdom.

Even though Prince Edward, the son of Henry VI., had neither calling nor desire to be a common lawyer,[57] Sir John Fortescue encouraged Edward to learn the common law's first principles,[58] as opposed to

[57] The traditional phrase *common lawyer* denotes one practiced in the methods of the common-law tradition as opposed to a student and practitioner of civil-law ideals, known as a civilian or *civil lawyer*. "Common lawyer" is sometimes abbreviated *commoner*, and "civil lawyer" is sometimes abbreviated *civilian*. To call a lawyer a "common lawyer" does not mean that he is common as opposed to being uncommon, or that he is of average ability. In addition, to call an attorney a "civil lawyer" does not mean that he is civil as opposed to uncivil, any more than calling a lawyer a "criminal lawyer" indicates that a lawyer is of criminal character as opposed to a lawyer that knows criminal law. See also §§ 3.9–3.9.6 of this book and accompanying notes.

[58] The common-law phrase *first principle* (from the Latin *principium*: "beginning") points to the originating source or fountain of law. Jerome uses *principio* in his translation of *Genesis* 1:1 and *John* 1:1 to denote "beginning." See generally §§ 5.3–5.3.1 of this book (discussing common-law first principles and providing examples). The common-law tradition understands the phrase "principle" as Jerome understood *principio* in *Genesis* 1:1 (Hebrew בראשׁה: *barosh*) and *John* 1:1 (Greek *εν αρχη: en arkay*). The etymological distinction between *principle* and the term spelt "principal" is significant. "Principal" derives from *princeps* and emphasizes preëminence, often of an imperial commander. For example, "Princepes" was a title used both of the Roman emperor and of the commander of a Roman army. CASSELL'S NEW LATIN DICTIONARY 472 (1st ed. 1960). The principles of the

learning the civil law's dogmas. Edward protested, saying that learning the common-law principles will consume time needed to learn other subjects. Fortescue disagreed. Getting an apt understanding of the common-law basics, he said, need not consume much time. Fortescue pointed out that if one learns the first principles of Scripture—as also Wyclif held was doable—, one can learn the first principles of the common law:

> [W]e declare we know the divine law when we feel we know faith, charity, and hope . . . and the commandments of God, leaving other mysteries of theology to the prelates [leaders] of the Church . . . Similarly, you will deserve to be called learned in the [common] law, if you have learned, in the role of a student, the principles and causes of the [common] law as far as the elements. It will not be expedient for you to investigate precise points of the law . . . these should be left to . . . judges and advocates who are in the kingdom of England called serjeants-at-law [lawyers] . . . .[59]

God never calls all to be trial lawyers and judges. Nevertheless, however, He does call all to know the Scriptures, proclaim the truth to others, and experience the aforetimes hidden truths (mysteries) of godliness. God no less also calls all to know and defend their political liberties and their personal freedoms and to teach these truths to others, in deed and by word. Thus, all are to prepare themselves to discern facts

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common law, therefore, neither include nor infer imperial commands, but rather, recognize standards of law from their originating source to which all are to aspire. "Our ancestors," writes Story, "brought with them *the general principles* [of the common law], and claimed it as their birthright . . . ." Story, J. *in* Van Nest v. Pacard, 2 Pet. 144 (emphasis added).

[59] SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE 23 (S.B. Chrimes trans. & ed., 1949) (1471). At the time of Fortescue's admonition to Edward, Fortescue, Henry VI., and Henry's son Edward were exiles in France. In addition, Fortescue's seventy-some years of age had well seasoned him in wisdom. The Serjeants-at-Law that Fortescue references in this quote were the common-law lawyers of Fortescue's time, privileged to argue before the common-law courts. The phrase *Serjeants-at-Law*, denoting "servants *at* common law" (*at* signifying a servant "in waiting"), was likely fashioned in response to the civil lawyers, proud to devote their lives in servanthood to the imperial bishop of Rome. Common lawyers devoted themselves to the common law and not to mere men. The common law is a jealous mistress.

In the same spirit, our law requires elected officials, appointed magistrates, and military men to swear an oath of loyalty to a set of common-law first principles called the Constitution, and never to political leaders. Common-law government is a government of laws and not a government of men. See generally § 3.9.1 of this book (pondering the phrase *serjeant-at-law* and its modern comparative phrase *attorney at law*.

and apply the law, when called upon to do so as the Jury. Following are twelve examples of common-law first principles all ought to know:

First, in the common-law tradition political office holders derive their immediate authority from the people they serve, by the people's invitation and under their advice and consent.

Second, executive officers and magistrates are servants of the people and are under the same law as all the people.

Third, the common-law tradition subjects government office holders and magistrates to impeachment and removal.

Fourth, government officers and other magistrates are foremost responsible to God; devoted, above all, to the law; and in direct accountability to the people to apply the law to themselves, to enforce the law, and to resist illegal acts of offenders in and out of government.

Fifth, neither the people, nor their representatives, nor the chief-of-state, legislate or make original or new law, but they discover and apply timeless principles of right.

Sixth, common law entitles to all persons due process of law, knowing that only by focusing on fair play can one hope for a fair outcome. Historically, common lawyers have recognized the indispensability of due process, Magna Carta calling it *the law of the land*.[60]

Seventh, common law forbids the government's executive and legislative powers from meddling with the courts.

Eighth, the common-law Jury are an indispensable foundation stone for common-law freedoms. Where the Jury operates aright, the government lawfully acts against the life, liberty, or property of the individual only with consent of the Jury.

Ninth, unlike the Greek republics and the old Roman republic and their progeny, which have passed, and continue to pass, from existence, the teachings of Scripture undergird the common law, thus its lasting steadiness.

Tenth, the common law's fundamental, distinguishing principles are as much confirmed customs arising from habit of mind (*lex non scripta*), as they are written standards of law (*lex scripta*).

Eleventh, a common-law country vouchsafes that government remains limited by insisting upon separate but equal government powers

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[60] "The words, 'due process of law,' were without doubt intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta* [ch. 45]." Murray's Lessee v. Hoboken & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (Curtis, J.). See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as an example of due-process violations driven by unrighteous judicial passion).

in ongoing rivalry and tension. Each of the three branches of government has proven eager and determined to maintain its prerogatives against the encroachments of the other two.

Twelfth, the common law demands that government practice restraint in two ways: first, by respecting individual rights so that each person feels an independent duty to obey God's desires, even where a command of the state clearly conflicts; second, by preserving the right to trial by impartial jurors that know their common-law duty to judge the facts and apply the law; also—when needed to get a fair outcome—to judge the law. Freedom requires familiarity with such rubrics of the common law.

§ 1.5
Common-Law Ideals Define America

The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of domestic relations, and the acquisition, control, and transfer of property from time immemorial . . . [A]s they [the English] took with them their nature, so they would take with them their laws, whenever they should transfer their domicile from one country to another.[61]

America's roots are largely Western, or Occidental, as distinguished from Eastern, or Oriental. The American tradition of law and government, however, stands in sharp difference from that of continental Europe and her offspring. America's identity is not one with Western culture because her law and government—her convictions of how to achieve practical justice—differ from most of the Western world. America, as Britain, though having European roots, is "unlike the remainder of Western Europe, which still retains the imprint and tradition of Roman law and the Roman system of government . . . .[62]

From America's beginnings, she has held fast to her common-law heritage. To appreciate this common-law identity, one must recognize that, unlike the rest of the Western world, the unique outworking of Christian liberty in American law and government has resulted from American affinity for common-law precepts. The common-law tradition

[61] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 21 (The Lawbook Exchange 1999) (1868).

[62] WINSTON S. CHURCHILL, THE BIRTH OF BRITAIN xvii (1956).

imparts practical and accurate principles to human law[63] and government that are consonant with Scripture.[64]

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[63] The writer uses the phrase *human law* and *human expressions of law* to signify man's attempt to give expression to the application of a principle believed—or at the least deemed—divine.

[64] See generally § 4.10 of this book (providing points of accord between Scripture and the common-law tradition). The *Westminster Confession* states that the *judicial law of God* found in the written Word of God is applicable to the present body politic, only insofar as general equity requires:

> To them [ancient Israel] also, as a body politic, He gave sundry *judicial laws*, which expired together with the State of that people; not obliging under any now, *further than the general equity thereof may require*.
>
> The moral law does forever bind all, as well justified persons as others, to the obedience thereof; and that, not only in regard of the matter contained in it, but also in respect of the authority of God the Creator, who gave it. Neither does Christ, in the Gospel, any way dissolve, but much strengthens this obligation.

Westminster Confession of Faith, ch. 19, secs. I, IV (emphasis added).

By requiring equity, the men at Westminster intended to encourage fair play, evenhandedness, and absence of bias. They took into account three things: the centuries-old jurisdictional struggle in England between the common-law courts and equity courts, the events then swirling about them while at Westminster. In addition, the Anglican Church Courts of England in that day—as until recent days—held jurisdiction over matters of equity as distinguished from law: *e.g.*, estates, trusts, family matters such as adoption and marriage, and equitable remedies such as injunctions. Equity courts acted upon the person (in personam); the common-law courts acted upon things (in rem). Common-law courts granted jurisdiction to equity courts in the extra-ordinary instance where a party showed that following the common law and its process will result in an injustice.

Early English translations of Scripture confined use of the term *equity* to the Old Testament Hebrew root ישׁר (*yashar*). The Assyrian cognates of *yashar* support the translation "equity": *esiru* means "to go straight"; *isaru* means "upright." *See* ROBERT GIRDLESTONE, SYNONYMS OF THE OLD TESTAMENT 100 (1897). Twice, the Septuagint translators render *yashar* with the verb *ορθοτομεω* (*orthotomew*): from *ορθος* (*orthos*), "right," and *τεμνω* (*temno*), "to cut." The participle form (*ορθοτομουντα: orthotomounta*) is the much-discussed verb of 2 *Timothy* 2:15 translated, "rightly dividing [or cutting straight] the word of truth." The Septuagint, says Girdlestone, is the best guide for understanding the term *yashar*:

> [It] is probable, that the LXX is the best guide. If so, we may render it 'rightly directing the word of truth,' *i.e.*, setting it forth in uprightness. Compare Gossner's version, where we find 'verfährt,' and the Vulgate, 'recte tractantem.' The work of the ploughman gives a good illustration of St. Paul's meaning."

ROBERT GIRDLESTONE, SYNONYMS OF THE OLD TESTAMENT 101 (1897), *citing Luke* 9:62. See generally app. 13 of this book, for an illustration of the ploughman ploughing straight. The Hebrew *yashar* signifies that which is straight: "on the level." In 2 *Chronicles* 32:30, *yashar* describes the necessarily straight course of Hezekiah's aqueduct—in that men tunneled it through solid stone, they took the shortest course, a straight line. By analogy to the hewing of Hezekiah's aqueduct, *equity* is the aim (the spring of Gihon: this and no other) and limit (no reason to tunnel further: this and no more) of human expressions of

Common-law ideals demand that a court's present application of the law to past facts serve as guidance for future behavior. The methods resulting from this ideal provide American courts and government with tools allowing *discovery*, articulation, and evermore-precise application of rules of law. By contrast, the civil law's methods demand forced application of legislation to what might happen in the future. Civil law is less discerning, requiring judges[65] to force the facts of a legal conflict into one of the state's legislative decrees.

This difference has placed the American tradition in perpetual tension and periodic conflict with much of Western culture and the world's remaining nations, which have nearly all received some version of the civil-law tradition. Throughout history, men have used the civil-law Code and its ideals to justify their atrocities: *e.g.*, the Waldensian and Spanish Inquisitions, the inquisitions and executions under bloody Queen Mary, the French Revolution, Bonaparte's dictatorship, Soviet Communism, Japanese Imperialism, Italian Fascism, German Nazism, and Central and South American dictatorships.

Civil law's encroachments have clarified the differences between the common law and civil law.[66] Our identity as Americans comes from the crucible of our struggles for truth, shared with those gone before and those with us now. To be an American is a blessing, but to know and understand one's identity through one's struggle for truth brings a deeper understanding and a greater blessing.

The government of God's Word—as also common law and government—consists not in a catalog of naked commands. When specifying certain portions, however, God's people divided the Old Testament into three parts: *Torah*, signifying only the five books of

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law, trusting the right application to later generations.

[65] By using the term *judge* in the context of the civil law, the writer implies not that such an one, in fact, *judges*. Unlike judges in common-law countries, judges in civil-law states are civil servants akin to administrative judges. The tribunals in civil-law states are not a separate branch of government, but rather are a cog in the machinery of the monolithic state: i.e., a government without adversarial branches that exercises checks and balances. Thus, civil-law judges are not to judge, but are to enforce the commands of the state, given by its Code.

[66] Well-known affirmations of the common law's principles include the following: Alfred the Great's *Dombec* (*circa* A.D. 875), the affirmation by William I. of the *Laws of Edward the Confessor* (1066), Magna Carta (1215, reissue 1225), John Wyclif's *De Officio Regis* and *Speculum Secularium Dominorum* (circa 1377), John Fortescue's *De Laudibus Legum Angliae* (*In Praise of English Law*) (1471), the Petition of Right (1628), the Habeas Corpus Act (1679), the English Bill of Rights (1689), the American Declaration of Independence (1776), and the American Constitution (1781). See generally app. 7 of this book, for further examples. The refinements of the common-law tradition occur case by case as jurors and appellate courts render their findings.

Moses; *Naveim*, signifying the prophets;[67] and *Cuthuvim*,[68] signifying the remaining writings. Because the *Cuthuvim* and the *Naveim* are founded upon God's initial written revelation to His people, i.e., the five books of Moses, all three categories—whether taken together or separately—were also called "law" or *Torah*:[69] meaning, in the strictest sense of the term, the way pointed out by the extended index finger.[70]

Torah, then, indicates "the way" set forth and pointed out as right. Thus, the Hebrew's *Torah* is no tradition of human imperialism: a strict list of orders *commanding* one to do or forbear from doing certain things. The *Torah*, instead, signifies heavenly standards toward which those on earth[71] are to aspire. Divine standards originate from the mind of the holy God and are, thus, compassionate and merciful; human imperialism is from the mind of man and lacks mercy and compassion. History is incontrovertible: the imperialism of mortal man is tyranny.[72] John the Baptist indicated the divine standard, when he directed attention to Christ as God's living Word or *Torah*: "Behold, the Lamb of God, the one bearing away the world's sin."[73] It is natural to picture John

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[67] Hebrew: נביאים.

[68] Hebrew: כתובים.

[69] Hebrew: תורה.

[70] See generally app. 3 of this book, for discussion and contrast of the two ancient biblical terms for *law*: the Hebrew's תורה (*torah*) and Greek's *νους* (*nous*). The Bible refers to itself as "the law of the LORD," "the law of faith," "the law of Christ," "the perfect law of freedom," "the perfect law," and "the royal law." For each of these phrases, one rightly substitutes for the term "law," the phrase *the way pointed out*. To do so makes for cumbersome English, but gives the biblical sense. The comparable Indo-European phrase *yewes-deik* also means, "one pointing out the law": *yewes* or *yewo*, meaning, "the one swearing," is also the ancient root of the Norman-French terms *juror* and *jury; deik* means to point out or show.

[71] Scripture recognizes two divisions in God's creation: the heavens and the earth. Solomon makes this distinction, denoting the earth with the phrase תחת השמש (*tacath ha-shamesh*): under the sun. *See Ecclesiastes* 1:3. All things that are under the sun exclude the heavens. In short, "under the sun" means *on the earth*. If one confines one's understanding of God's universe—his life-and-worldview—to those things on earth, then, according to Solomon, each thing he considers or does is הבל הבלים (*haveil havaliem*): Hebrew superlative construction, "the most useless thing possible." Hebraist Walter Kaiser translates: "to no purpose." This is not because the earth is evil in and of itself, but because if one confines one's consideration of the world and life to those things on earth only, one disregards God's authority, power, and glory over man's life on earth.

When the writer uses the word "earth" or "earthly," he does not mean that the earth is evil. Indeed, God has declared His creation of both heaven and earth to be good (טוב מאד, *tov me-odth*: exceeding good). *See Genesis* 1:31. To disregard the influence of heaven in the affairs of earth is to deny God's sovereignty over His earth. Indeed, we are to pray that God's will be done on earth, as it is in heaven. *See Matthew* 6:10.

[72] Because no man has native good, even the compassions of the godless are cruel. *See Matthew* 19:17, *Proverbs* 12:10.

[73] *John* 1:29b. The Greek verb here, *bearing away* (*αιρω: airow*), denotes a two-part sequence: a "lifting off" of sin and a "carrying away" or asportation.

with excited utterance, index finger extended, pointing out Jesus. Indeed, Jesus later declared of himself, "I am *the* way":[74] i.e., the way pointed out—the divine living *Torah*. God's way pointed out is a directive presented for each person to follow after.

The history of common-law principles is found in the ancient recorded conflict between the two worldviews that first clashed in the Garden of Eden, later at the tower of Babel, and continued to clash as Babel's offspring wielded its sword and sway; these things Scripture records and human history attests. This conflict of laws still simmers; at intervals it boils over in brush-fire battles and international clashes of arms. As long as men and nations disagree over which fundamental standards of law will govern relationships, tension of war will continue.

History's course and nature's experience has bred the rudiments of the common law into the American mind but Americans, in education and practice, have abandoned the understanding of our common-law tradition's accord with nature[75] and Scripture. Consequently, through this loss of understanding, civil-law infringements of common-law freedoms and safeguards erode its practice.

§ 1.6
Common Law Reveals America's Character

[A]rbitrary power and uncontrolled authority were not recognized in . . . [the common law's] principles. Awe surrounded and majesty clothed the king, but the humblest subject might shut the door of his cottage against him . . . The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people; and if the criminal code was harsh, it at least escaped the inquisitorial system which fastened itself on criminal procedure in other civilized countries, and has ever been fruitful of injustice, oppression, and terror.[76]

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[74] *John* 14:6: "I, *I* am the way . . . ." (*Εγω ειμι 'η οδος*).

[75] The writer uses the term *nature* to signify two things: the physical (material) universe comprising tangible and corporal forms perceivable by the senses, and mankind's universal capability, divinely impressed upon his *ψυκικος* (*tsukikos: e.g.*, his physical nature), to discern right from wrong. See generally § 5.1.2 of this book (discussing *Romans* 2:14–15 and man's natural capability to discern true law and its application).

[76] COOLEY, *supra* note 61, at 21–22. Even during the unsettled times of England's nation-wide Peasants' Revolt of 1381, common-law restraints prevailed: no government action against any was taken except by consent of the Jury:

> [T]he reaction was, according to modern examples, very restrained . . . There was nothing like the savagery we have seen in many parts of Europe in our own times. Law re-established rule by law. Even in this furious class reaction, no men hanged except after jury trial.

The common law is an excellent tradition, resting on foundations that encourage a slow, sure-footed, and steady pursuit toward good government and application of law. Though often in a rough-and-ready way, the common law has shown its excellence:

> By far the larger and more valuable portion of that body of laws [of the united States] consisted of the *common law of England*, which had been transplanted in the American wilderness, and which the Colonists, now become an independent nation, had found a shelter of protection during the long contest with the mother country at length brought to so fortunate a conclusion . . . To eulogize the common law is no part of our present purpose. Many of its features were exceedingly harsh . . . But *on the whole . . . it was the peculiar excellence of the common law* that it recognized the worth, and sought specially to protect the rights and the privileges of the individual man . . . [77]

The common law's peculiar excellence is owing to its first principles[78] and its ability to get at truth, often buried under falsity and further obscured by tangles of civil law's bureaucratic and regulatory confusion. Time will erode and discard the common law—if Americans forget the traditional reasons for these first principles and their rare methods and due process. Our common-law tradition supplies the means by which Americans defend and translate paper rights into experienced freedoms. The ideals of the common law constitute a worldview of law and government that generates a body of mental and practical procedure aimed at discovering truth, in fact and law.

John Deere's new-fangled steel maul-board plough enabled men to farm the Midwest prairie dirt. The topsoil was of such a gummy, thick, and rich heaviness that only John Deere's patented plough turned the weed and tangled grass cover under, where it rotted, doing the soil good; and turned the hidden topsoil face up to the sunlight. Moreover, Deere's steel plough did its work with ease theretofore unknown. The farmer,

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CHURCHILL, *supra* note 62, at 273.

[77] COOLEY, *supra* note 61, at 21–22.

[78] See generally §§ 5.3–5.3.1 of this book (discussing common-law first principles and citing examples).

however, saw these advantages of the steel maul board only if he first got his plough to *scour*.

When ploughing time came in the spring, the writer's father pulled from the shade of the fencerow three ploughs: a two-bottomed McCormick, a three-bottomed McCormick, and—his favorite for its level ploughing—a four-bottomed John Deere. Although we had oiled the ploughs' maul boards the fall before, the unrelenting wet winter weather had rusted them nonetheless, making the ploughs impossible for the tractors to pull. So, he directed us to pump a couple of buckets of water from the cistern, fetch busted-up chunks of sandstone from the branch, and then set us to scouring rust from the ploughs' nine maul boards.

Scouring the maul boards free of rust eased the friction between the boards and the dirt, enabling the tractor to begin pulling the plough. As the ploughman started his rig forward, reached back and pulled the trip-line, dropping the plough to the ground, the coulters cut through the weeds and brambles, the shears bit in, and the mostly-scoured maul boards pulled down into the sod with ease. The dirt, now sliding over them, further scoured the boards until polished bright, turning the weed cover under, turning up that which was hidden, and airing it to the sunlight. Without doubt, scouring made ploughing possible: no scouring, no ploughing; no ploughing, no crop; no crop, no living. In short, scouring was the unavoidable first step to getting good from the dirt. Thus, nothing aggravated a ploughman more than a plough that refused to scour.[79]

Although the common law, as the plough, is a tool for getting at truth for our good, it will never plough until first scoured free from rust-like

[79] Abraham Lincoln's response to his Gettysburg Address illustrates *scouring* as applied to one's understanding of common law and government. The Gettysburg Address is an expression of certain fundamental principles of common law and government set in biblical terms drawn from the Gospel of John. After delivering it, however, Lincoln believed that he had delivered a short and dead comment that paled compared to Edward Everett's eloquent two-hour professional oration, delivered just before Lincoln's address. Lincoln, upon completing his address and taking his seat on the platform next to another dignitary, leaned down to his neighbor's ear and spoke in aggravation, "That speech of mine will never *scour*." His were the prairieman's words, meaning that for all his work he was unable to rid his speech of hindering rust and get it to polish bright and slick as a plough's maul board must be in order to easily pull into the sod and—as the prairie farmer says—turn it *under and up*: the top turned under, that which was on the surface becomes a benefit of nutrients; the under side turned up, that which was hidden becomes open to the fresh air and sunlight.

Abraham Lincoln misjudged his short comment; indeed, the Gettysburg Address had scoured, for it continues to plough, turning up truth and strengthening understanding of first principles of law and government. Everett's professional oration, however, remains as an abandoned plough parked in an old fencerow: forgotten, maul boards rusted, and unable to plough.

civil-law notions, which cause hindering friction. Learning what these notions are will allow the common law to begin ploughing, but only by steady ploughing in real cases will the maul boards scour clean, polish bright, and show their efficiency. Scouring being the first step toward enabling use of the common law, it behooves all concerned to see the difference between the steel and the rust, then to separate the two by off scouring most of the rust, and finally, to put the common law to use, which will polish its maul boards bright. Scouring is good for the steel, but the rust falls apart under the rigor.

The common law tradition is about the facts of past events. Though within the reach of all, it has ever remained in the minority throughout the earth. In short, the common law is still uncommon. History records facts from which one can draw reasons and form conclusions about common law and government.[80]

§ 1.7
Common Law –*vs*– Civil Law: Introductory Contrast

No political scheme has ever become dominant
which was not founded in a specific religious or anti-religious conception.[81]

Two contrary traditions of law and government prevail over the earth: the common law and the civil law. The common law rests its footing upon due process and according to its course tries all things, including human reason. The civil law, on the other hand, appeals to human notions of perfect reason and utopian faith. The common-law tradition governs only a handful of countries, is consonant with Scripture, and acknowledges the eternal and divine source of law. The civil-law tradition, on the other hand, governs most nations and is fundamentally Babylonian, relying human reason. "If we search out the origins of Roman law," say Pollock and Maitland, "we must study Babylon . . . ."[82]

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[80] It is in the spirit of the common law for a fellow to articulate the reasons for his conclusions. For example, at the outset, the Declaration of Independence states, "[A] decent Respect to the Opinions of Mankind requires that they should declare the causes . . . ." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[81] ABRAHAM KUYPER, LECTURES ON CALVINISM 78 (1961), *quoted in* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 55 (1974).

[82] 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I. 561 (Cambridge Univ. Press 1968) (1898). See generally §§ 2.1–2.1.3 of this book (providing a brief account of the origin of Babylon, its early history, and the reasons for its founding, law, and government). John Henry Merryman recognizes three families or groups of legal traditions: common law, civil law,

The common-law tradition recognizes the necessity of human administration of law and government,[83] while providing safeguards against lawless power, which men will seek to exert over others. The common law, however, never teaches the individual to elect or appoint other men to decide between right and wrong for him; to arrogate to elected officials and appointed magistrates such power is tantamount to idolatry. The duties, therefore, of those administering government are ministerial: God binds magistrates and other officials to act consonant with His character in word and deed.

For example, Jesus, standing before Rome's inquisition in bold confidence, cast His words into the teeth of Rome's high-minded Babylonian misunderstanding: "You have not even *a single scintilla*[84] of authority against me, unless it *were perfected*[85] to you from above." Thus, in the common-law tradition, all law is *derivative*: men must derive law from the God of creation. Under the civil law tradition, men are the fountain of law: i.e., law comes from some intellectual elitist, whether called priest, scholar, politician, legislator, dictator, or judge.[86]

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and socialist law. It seems Merryman adds socialist law as a rubric, stating that socialist systems are not similar enough with civil law to fall under its heading. *See* JOHN HENRY MERRYMAN, THE CIVIL-LAW TRADITION 1–4 (2d ed. 1985). Merryman, nevertheless, highlights the abiding influence of civil law in socialist nations, observing that socialist nations arose out of civil-law states, "Hence," he says, "an understanding of the civil-law tradition is essential to an understanding of socialist law." *Id.* at 3. Merryman continues, "Soviet legislation . . . builds on the civil-law tradition of system and order." *Id.* at 4. Therefore, for the purposes of this book and with support from the record of history, the writer includes the law and government of socialist nations within the civil-law tradition. Merryman wrote the foregoing comments before the Soviet socialist state and its satellites collapsed.

[83] Both nature and Scripture teach that men are individually responsible to God for their administration of His of law and government. *See* 1 *Corinthians* 4:3. See generally apps. 3, 26 of this book (contrasting the biblical concept *day of man* with *the DAY of the LORD* and discussing the civil law's inquisitorial character).

[84] *John* 19:11. *Ουδεμιαν* (*oudemian*): literally, "not even one thing." Though this writer's expansion of Jesus' words, "not even a single scintilla" (i.e., a *traceable spark*), is not by the letters, he believes it gives the emphasis Jesus intends.

[85] *Id.* As with all of John the apostle's writings, his simple vocabulary heightens the profound and accurate nuances his accidence and syntax deliver. Understanding demands rumination; it is difficult, if not impossible, to pack John's nuances into a single translation. Called the periphrastic pluperfect, John's grammar here is of intensive force and consummative effect. The first verb of his phrase, '*ην* (*hayn*: "were"), is in the Greek imperfect; his next verb, *δεδομενον* (*dedomenon*: "being given"), is in the Greek perfect (i.e., a legally perfected gift): thus, the Author of all authority gives His authority and perfects it by providing confirming notice to the recipient and binding notice to all others. *See generally John* 3:27, for an affirming statement, using like vocabulary, accidence, and syntax. *See also John* 15:5.

[86] Fuller argues that while American common-law judges give lip service to their function as *oracular*—i.e., discerners and declarers of the law—they nonetheless, manufacture the law from their own minds:

Moreover, the common law focuses on *relationships*. Thus, one determines applicable standards of law only by first recognizing the kind of relationship that exists between contending parties. Once this question of fact is discerned, out of this relationship kind arises fitting levels of rights and responsibilities. Relationships being the common law's leading concern, the law is foremost the tool to protect relationships.[87] Civil law, on the other hand, focuses on the will of the state, thus its tribunals determine the applicable law by first citing the Code and then reasoning

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> The general fiction of Anglo-American jurisprudence that courts do not "make" law, but only "discover" or "declare" it, has been the cause of innumerable special fictions designed to conceal the process of legislation which actually goes on in the courts. It is interesting to note that a similar general fiction on the Continent, that courts do not "make" law, but only "interpret" a statutory system, has had precisely the opposite effect, i.e., it has dispensed with the necessity for special or particular fictions.

L.L. Fuller, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 542 (1930–1931).

Fuller continues, stating that praetors of Rome held the same fiction by appealing to a higher law in their gods. *See id.* Fuller, however, fails to acknowledge the many differences the common-law courts that serve as safeguards against the abstract manufacture of law. Note, for example, the following two differences: the higher law (god) to which Rome appealed was a false god (the Roman state) and not the God of Scripture; whereas the common-law tradition rests for its reliability on due process, which checks the veiled attempts of judges to legislate.

[87] Common law distinguishes two fundamental kinds of relationships: fiduciary and non-fiduciary. The fiduciary relationship demands a higher level of loyalty and altruism, requiring the fiduciary to act in the best interest of the other party, even if doing so is to his own detriment. *See, e.g., Psalm* 15:4. The non-fiduciary relationship is less altruistic: allowing each party to look, within the bounds of law, only to his own advantage. For example, as a rule, property, contract, and tort law concern non-fiduciary relationships; trust law and the law of agency are fiduciary relationships. The law of agency, however, concerns, to varying degrees, both fiduciary and non-fiduciary relationships, depending upon the level of obligation entered. In order to fully appreciate the common law, one must first understand and be able to distinguish relationship kinds because only by discerning relationships will one rightly discern rights, responsibilities, and liabilities. See generally § 5.3.3 of this book (discussing the five facets, or relationship kinds, of the common law).

To seek the false security of following government commands irrespective of the relationship kind is *legalism*: state domination of freedom of association in private relationships. Instead of seeking to first discern and understand one's relationship so that one will know one's duties respecting another, men are prone to first seek to learn a set of rules and then set out to keep them. One is unable to discover the applicable rules, however, until he ascertains the sort of relationship between parties. Law—viz., rights and responsibilities—is a function of relationships, and not vice versa, because law exists, foremost, to protect the integrity of relationships freely entered. See generally *Luke* 10:25–37, for an example of a civil-law-minded lawyer that, in an effort to justify himself, put the cart (the rules) before the horse (clear grasp of his relationship with God). See generally note accompanying *Preface* of this book (discussing *Luke* 10:25–37). For example, one's responsibility to God arises from one's relationship to God. Thus Scripture prefaces the Decalogue with a statement of relationship: "I am the Lord your God." *Deuteronomy* 20:2.

from that legislation to a judgment. The will of the state being the civil law's driving concern, legislation is foremost. In short, the state's will is the reason.

In civil-law countries, the state simply commands its will; the law is the tool of the state to effect that will. Under civil law, private and individual determination of relationships—freedom to chose one's relationships (association) and freedom to define one's associations by defining one's rights and responsibilities (contract)—are of secondary concern. Even though one can often choose his relationships, the civil law is not foremost bent on protecting relationships. Thus, civil law gives only the appearance of freedom of association.

By contrast, freedom of association forms the footing of the common-law tradition. This footing, however, is grounded in a greater truth: the eternal God is the fountain from which all true law springs. Thus, the common-law tradition says that men never make, but rather discover law by first recognizing the duties different sorts of relationships demand. Because law is of timeless origin in the common-law tradition, all men and the state are subject to it. By contrast, the civil-law tradition demands that because law is the will of a group of men or of a man, expressed by the state's legislative decree, law changes as man's desire and will changes. Further, since the state deems the law to have emerged from its womb; the law, therefore, is subject to the state and not the state to the law. Consequently, freedom to associate and to define private relationships by promises, commitments, covenants, and contracts is subject to impairment by the state's legislative will. Whereas, in a true common-law country, impairment of relationship obligations[88]—such as contract—by the will of a legislature, or a legislator, is unlawful.[89]

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[88] The relationships with which the common law concerns itself have duty, which arises either direct from the law or direct from someone's commitment that the law will enforce. Such commitments, the common law also calls undertakings or promises, and can be shown by actions or circumstances, or by words, spoken or written.

[89] A contract at common law is best defined as a promise the courts will enforce; our Constitution forbids any State legislature from impairing such promises. *See* U.S. CONST. art. I, § 10, cl. 1. The Constitution, however, does empower the federal government, through bankruptcy laws, to impair obligations of contract, which is debt. *Id.* § 8. cl. 4, the purpose of which is "to relieve honest debtors from perpetual bondage to their creditors," which otherwise "obviously destroys all encouragement to industry and enterprise on the part of the debtor." *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 49 (Durham N.C., Carolina Academic Press 1987) (1833). *See also generally Leviticus* 25:8–17, wherein the purpose of release of all debts is so that "you shall not oppress a man of your people; but that you shall fear your God." *Id.* at verse 17. Thus, a government without relief "from a slavery of mind and body," of otherwise unending debt of the unfortunate debtor, says Justice Story, "is incompatible with the first precepts of Christianity; and is a living reproach to the nations of Christendom, carrying them back to the worst ages of paganism." STORY, *supra* this note 89, at 386. Here again is seen the

Common-law government includes two related concepts: officers and magistrates of government are servants to all others; from this relationship, reciprocal rights and responsibilities arise. Civil-law government holds the opposite: the governed are servants to those that govern, and the *will* of those that govern is to dominate the governed.[90] Indeed, civil-law scholars speak of legislation as the commands of a master to his servant. Common-law government has authority to act only with consent of the country as given by those under oath to keep government action within the scope of its authority: that is, the Jury (representative samples of the country), and elected officials and appointed magistrates (representatives of the country).

Every nation and its government hold to some fundamental standard of right and wrong called law; this standard must have a source, since ancient times called a lawgiver.[91] Further, the source of a nation's law will be either the God of Scripture or a false lawgiver. The common law uses *trials*—public, oral, compressed in time, fact intensive, personal, and confrontational. The civil law disdains trials. The common law uses reason as one of many tools—*e.g.*, facts, the Jury, due process, court findings, legislation, and reason—to get a at truth. The civil law uses only the Code and reason, testing reason against more reason.

Reason, however, is only one tool within reach to aid men in their pursuit of truth and quest for fair play. Moreover, unless premised aright and rigorously tested, human reason is never reliable to uncover truth. Each person is a fashioning together of many parts. God's Word written and nature,[92] through our senses, teaches two principles: reliance upon

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importance of independent courts: if the legislature controls the courts, and dictates which promises the courts shall or shall not enforce, the legislature has defined what is and what is not a contract and thereby removed some or all promises from protection against impairment. Our Constitution assumes the common-law principles, without which the Constitution is a nullity.

[90] To further illustrate, the law of Rome and the law of imperial Japan both demanded that the individual devote himself to the emperor, and if need be, die for the emperor. By contrast, the standard of Scripture provides that Christ prove Himself worthy of the individual's devotion by dying for the justification of that individual; the record reveals that Christ has so done. It is contrary to Scripture, and the common-law tradition, to entrust one's self and life to any other; for no other has, nor is able, to merit such loyalty.

[91] The civil-law tradition rests upon the mind of man as the fountain of law and ultimate authority; the traditional common law rests upon the God of Scripture as opposed to ultimate trust in man or any combination of men.

[92] The writer uses the term *nature* to signify two things: the physical (material) universe comprising tangible and corporal forms perceivable by the senses, and mankind's universal capability, divinely impressed upon his ψυκικος (*tsukikos: e.g.*, his physical nature), to discern right from wrong. See generally § 5.1.2 of this book (discussing *Romans* 2:14–15 and man's natural capability to discern true law and its application).

human reason alone will not render truth, but trials—which will draw in the whole of a person—refines and renders up truth.

Thus, the traditional common law has sought to test all things by trial, including custom, legislation, facts, and reason. Further, common-law trial seeks to consider all that is legally relevant; in addition, as congressional hearings demonstrate, common-law government seeks all that is politically relevant. The common-law has descended from a people bent on protecting personal freedom to choose and define relationships in the courts and in government. Consequently, it demands debate and trial, open and in the light—which, therefore, must be oral—to determine truth. By contrast, the civil-law tradition, having descended from a culture bent on protecting the will of the state, conducts court cases in writing, is quick to seal court documents from public scrutiny, and is prone to conduct the affairs of state (including the conduct of courts) behind closed doors. The common law is an oral tradition of witnesses' exact words recorded; the civil law is a written tradition of expert opinion summations.

In sum, the common law, trusting fair play to gain substantial justice, tries all things against all fitting tests; whereas the civil law, trusting human reason to achieve the utopian illusion of applied legislative precision, measures all things by human reason expressed as legislation. History is clear and personal experience agrees: substantial justice is achievable, legislative precision is fantasy; fair play satisfies, utopian schemes disappoint.

Chapter Two

Civil Law: Origin & Growth

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§ 2.1
Babylon:
Conceived in Civil Law

If we search out the origins of Roman law, we must study Babylon . . . .[93]

THE founding of Babylon enabled the efficient ordering of civil-law ideals. Its urban setting allowed ease of state administration and expedient execution of the ruler's will. The controlling element in the Babylonian tradition of law and government is achievement of the state's will and not, as in the common-law tradition, the encouragement and preservation of private relationships.

To understand the present, says d'Aubigné, one must know the flow of the past. Pagan society, he says, "like man . . . has its infancy, youth, maturity, and old age."[94] Indeed, Babylon, in her childhood on the Plains of Shinar, learned to control those men in the East, who had conceived her in their fantasies. In her youth, she had her playful way with the Greeks, who caressed her, bejeweled her beauty, and boasted the betokens of her coming benefits. In her stern womanhood, she had her cruel way with those under Rome's yoke—dominating, demanding, and destroying any daring to differ. In her older years, as her raw power waned and fell from her hand, yet hardened by her imperial exploits with her iron legions, she donned a priestly robe over her Roman toga, called herself Christian, and meddled with princes, manipulating their powers. The attractiveness of her fantasies now spent, the empty results of her ways now proven, old age draws her ever deeper into its spiral. Babylon's doctrines, however, having by now seeped into most every corner of the globe, she erupts in cruel cynicism, often without warning and from unexpected places.

Knowledge of Babylon is necessary to understand the civil law tradition; knowledge of the written revelation of God is necessary to a true and accurate understanding of Babylon: her founding, her leaders, her place in history, her propagation of cities, her false religion, her

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[93] 2 POLLOCK & MAITLAND, *supra* note 82, at 561. See also generally §§ 2.1–2.1.3 of this book (expositing and discussing *Genesis* 10:8–9, the intent of Nimrod, and of the settlers of Babylon).

[94] 1 D'AUBIGNÉ, *supra* note 19, at 24.

counterfeit law, her economic policy, and her tyranny.[95] Of all the cities the Bible mentions, it refers only to the city of Jerusalem more times than it refers to the city of Babylon. The city of Babylon, and all that pertains to her, threads through the pages of Scripture: from her first mention in Moses' *Genesis* to her last in John's *Revelation*, Babylon signifies that which is antagonistic to Jerusalem and all it betokens. Scripture records Babylon's founding in the region of Shinar,[96] in modern-day Iraq. Beginning with her tower, or *ziggurat*,[97] the character and sway of the city of Babylon over all nations is notorious.[98]

Babylon was the beginning of Nimrod's power.[99] Her settlers laid her foundations and built her tower in rebellion against God's covenants with Adam[100] and Noah,[101] whereby God stated that the offspring of these two

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[95] Knowledge of Babylon's false fundamentals and her place in history are indispensable to a genuine grasp of God's written revelation, the understanding of history's flow, and the use of wise discernment and prudent planning because the methods used at Babylon to subvert God's covenants still operate in this present world.

[96] *Babylon* likely drew its name from the Semitic root בלל (*balal*), meaning, "to confound" or *mix*. Another possible meaning is "[city of] repeated regeneration." Semitic terms of redundant bilateral form, such as *balal*, are emphatic. Consistent with this redundancy is history's record that Babylon has duplicated her system of religion, law, and government, without discretion on every continent. Because of her indiscriminant habits and prolific reproduction, John the apostle—writing when Babylon had been reduced to hardly more than a village—recognized the continuing multiplication and unbounded breadth of her offspring and described her thus: "Mystery, Babylon the Great, the mother of whores and foul disgust." *Revelation* 17:5.

[97] See generally § 2.1.3 of this book (describing the reason for the tower of Babel, its design, and its spread among mankind worldwide).

[98] *See* FORTESCUE, *supra* note 59, at 29.

[99] *See Genesis* 10:6–10. Nimrod was the grandson of Noah's son Ham: Noah begat Ham, Ham begat Cush, and Cush begat Nimrod. Nimrod's uncle (his father's brother) was *Mitzraim*: the father of the Egyptians. *Mitzraim* (מצרים), translated "Egypt" throughout the Hebrew Old Testament, is the dual form of the Semitic noun מצר (*matzor*: to suffer distress by tightening or narrowing in straits)—in addition to our English singular and plural forms the Semites added a dual form—, signifying Upper and Lower Egypt. The singular form *Matzor* is found in later Old Testament books. *See, e.g.*, 2 *Kings* 19:24, *Isaiah* 19:6, 37:25. Nimrod's father Cush had another brother named Canaan, the father of the Canaanites. Nimrod's kin were a colorful lot.

[100] *See Genesis* 1:28. God's covenant is God's undertaking to bless the entire race of man, which is *'adam*: the recipient of God's covenant promises and commission:

> The most common meaning of the Hebrew word . . . אדם (transliterated *'adam*) . . . is . . . men in general . . . [T]his word refers collectively to men, women, and children. It is obvious from the whole context of Genesis 1:26–28 that the word אדם includes both the male and the female of the species. Thus the whole race, male and female, is made in God's image and is to exercise dominion over the earth.

WILLIAM GESENIUS, HEBREW AND CHALDEE LEXICON OF THE OLD TESTAMENT vii (Samuel P. Tregelles trans., 1981) (1847), *quoting* linguist Samuel Prideaux Tregelles.

fathers of Adam's race shall multiply and spread abroad over the land, covering the earth. By this multiplication and migration, God had decreed that mankind was to take lordship over the earth—never over each other—,[102] using the earth and its abundance according to God's directives and to God's glory. Since mankind, however, holds his right over the earth[103] from God and at His pleasure, man's lordship is lawful only as he exercises it within the scope of God's directives.[104] Thus, all acts outside the scope of God's Word are unlawful. Nevertheless, the Babylonian settlers, determined to thwart God's directives for man's lordship over the land,[105] encouraged Nimrod's ambition to lord it over them, and then submitted to Nimrod's domination. In short, the Babylonians initiated Nimrod's scheme and willingly embraced its notions.[106] As their Babylonian system developed, it enabled the city-state's evermore constant and efficient fleecing of its people.[107]

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[101] *See Genesis* 9:7. In this verse, God refines and recertifies to Noah—the father of all men from the end of the great flood forward—His undertaking of His covenant promise, first given to Adam.

[102] This promise, called the Adamic covenant, uses the Hebrew term for earth אֶרֶץ (*'erets*), in two senses: one broad and the other particular. Used in the broad sense it signifies our entire planet relative to the entire race of Adam: *the earth*. Used in the particular sense, it denotes the land of Canaan relative to Abraham's descendants: *the land*. When used in this particular sense, *'erets* carries the definite article of specificity, הָאָרֶץ (*ha'arets*: "the land"). When, however, referring to other particular areas of the earth, *'erets* carries not only the definite article, but also additional descriptive phrases.

[103] Scripture limits the authority (jurisdiction or the right to act) of man's lordship to the earth. Scripture grants no lordship to operate over the heavenly bodies and expressly forbids any one from taking dominion over (dominating) one's fellowman.

[104] The Hebrew תּוֹרָה (*torah*) signifies the set of directives God has set forth for standards; it is God's way pointed out. The scope of mankind's lordship or dominion over the earth is only within his obedience to God. Obedience to God is obedience to His directives: it is to act in obedience to and in accord with God's law. Adam failed this responsibility. God had granted to אָדָם ('*Adam*: mankind) lordship over a particular parcel of real estate called the Garden of Eden. This lordship was to expand geographically as Adam's race multiplied. Through disobedience, however, Adam forfeited this lordship. God intends His people to exercise His lordship, according to His directives and purposes, in all spheres incident to mankind's control of the earth and its resources.

Law and government are necessary ingredients to well-ordered exercise of man's derived lordship over the earth. It is the task of God's people to intelligently exercise God's Lordship in light of the coming Lordship of Christ: the second Adam sent to accomplish what the first Adam failed to do. *See* 1 *Corinthians* 15:47. When Christ receives the title deed right over every square foot of the earth's real estate and its accompanying resources—i.e., the earth and all the richness thereof—, Christ's practical dominion over the earth will begin. *See generally Psalm* 24:1 ff. (recognizing the LORD's right to the land and all it contains, and the dependency of man's derived dominion upon his obedience to the LORD).

[105] *See Genesis* 10:8. See generally § 2.1.1 of this book (expositing and discussing *Genesis* 10:8–9, the intent of Nimrod, and of the settlers of Babylon).

[106] *See, e.g., Genesis* 11:1–6. In later centuries, the elders of Israel asked God for an arrangement alike to Babylon's: a ruler on earth they could see instead of the God of heaven they could not see. *See* 1 *Samuel* 8:4–5. The LORD says the evidence of a people's evil

Concentration of population in the city of Babylon enabled Nimrod to exploit men using a tightly controlled political machine designed to work evermore-efficient enforcement of central economic policy. Moreover, Nimrod's religious scheme gave color of divine authority to the Babylonian city-state and under girded Nimrod's political plan. Though acknowledging the Creator's existence, Babylonian religion disregarded any appeal beyond the city-state to the Creator and His Word:[108] all divine power was said to reside in the breast of Nimrod. As people flocked to this great city, Nimrod became their shepherd, inserting himself between God and man, claiming that God had given to him all authority.

Civil law stems from Babylon and is *inquisitorial*, encouraging and requiring the state's violation of one's freedom of conscience. This ever-present trait arises from the Babylonian system's dependence upon the priest's judicial power to examine its subjects in the Babylonian deity's name. In theory, the Babylonian deity—using various names worldwide and personified in the state or its demagogue—invested his priests with the power to examine the consciences of devotees by whatever means necessary, granting absolution or condemnation according to their imperious pleasure. By entrusting themselves to a totalitarian *state*, the Babylonian settlers established statism. The term *state* denotes an instituted system that is total, subsuming in itself all spheres of activity. Babylon's tool to this end was the confessional; the methods were inquisitional. Babylon's inquisition purported to place the entire being of

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craving for another man, or men, of their choosing to dominate them, in exchange for provision and protection, is "in the voice of the people [בקול העם: *bacoal ha-am*]." 1 *Samuel* 8:7.

[107] History, within and without the Bible, reveals that those to whom a nation looks for protection are the enslavers and masters of that nation. Thus, God, never desiring that men enslave one another, desires His people to look to Him alone for protection.

[108] Civil law teaches that political authority arises (1) out of the *will* of men or a man; (2) determined, and able, to use *force* to achieve that will; (3) in order to dominate other men and women. On the other hand, common-law ideals of political authority arise (1) out of law; (2) discovered by following *due process*; (3) according to which the country determines to whom it will temporarily entrust the tool of force to achieve respect for that law. As a practical matter in civil-law states, political power and claimed authority has grown out of gun barrels: government by outward power. In common-law countries, it has grown out of truth's proclamation through freedom of speech: government motivated by truth through words. Because man's arbitrary will coupled with the power necessary to execute and enforce that will are indispensable to the civil-law tradition, communist advocates of civil law have defined politics to be war without bloodshed and have defined war to be politics with bloodshed.

the accused—body, soul, and spirit—in the hand of the priest or his minion, acting as judge.[109]

In time, the Babylonian kings' religious and inquisitorial claim of priestly authority passed to a *pontifex maximus* elected for life. This office, along with its name and characteristics, still functions in fact, if not in name, having stemmed from the councils of ancient Babylon. Even before Rome's founding in 753 B.C. and continuing through its earliest days, the *pontifex maximus* was the chief priest of the secret mystery religions of Rome's founding families.

Following Constantine's rise to power in the fourth century, the Roman emperors transferred the title and office of *pontifex maximus* to the bishop of Rome, along with the ancient Babylonian forms and trappings of imperial power. This transfer was gradual, until emperor Gratian acknowledged full investment of the title in the imperial bishop of Rome.[110]

To sum up, from the beginning, God purposed that mankind[111] take lordship over all the earth to the glory of God, but instead, the Babylonian settlers allowed Nimrod to take dominion over them, to Nimrod's glory.[112] In pursuit of Nimrod's ambition, and in concert with the tower of Babylon or *ziggurat*, the Babylonian system of false religion, law, and government developed. Moreover, the Babylonians deified Nimrod in their eyes, thereby deeming him the lawgiver[113] upon whose law his government rested. God, by breaking up the Babylonian settlers'

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[109] See generally § 5.1.10.1 of this book (discussing the Babylonian confessional and its use in priestcraft).

[110] In later centuries, Europe referred to the doctrine behind such arrogation of power as *the divine right of kings*. Throughout England's history, vicious intermittent eruptions of this doctrine clashed with the common law, culminating in the English Parliament's war with Charles I., followed by the American War of Independence with Parliament, each clash further defining and strengthening the common law's ideals. See generally § 5.1.6 of this book (distinguishing between the English Parliament's war with the royalists and the War of American Independence on the one hand; the papal, French, and Russian revolutions on the other). See also generally §§ 3.8.1–3.8.2 of this book (discussing the divine-right-of-kings theory, John the apostle's reference it, and the common law's aversion to it).

[111] Hebrew: אדם (*'Adam*). *See, e.g., Genesis* 1:26a.

[112] Christ referenced the misplaced dominion of one man over another, when He instructed His disciples, "[T]he rulers of the Gentiles exercise dominion over [i.e., dominate] *them* . . . ." *Matthew* 20:25 (emphasis added).

[113] The writer uses the term *lawgiver* in two senses: limited and an unlimited. When used in the limited sense, "lawgiver" denotes one having the penultimate power of man's earthly judgment from which there is no appeal on earth. When used in the unlimited sense, "lawgiver" denotes God, the Maker of heaven and earth, the One having final and ultimate judgment over every application of all other decrees on earth and in heaven. See generally app. 22 of this book (explaining and discussing final judgment as a scriptural and common-law concept).

tower project, scattered these fallen[114] sons of Adam throughout the earth;[115] their descendants have duplicated and reduplicated throughout the earth the fundamental practices of Babylonian religion, law, and government. According to Scripture, history, and present evidence, Babylon lives on, propagating her system of law and government in aggression.

§ 2.1.1
Nimrod & Babylon's Settlement

[The] state should not be confused with the whole community of persons living within a territory . . . in the ideology of totalianarianism [the state is] an all-embracing institution . . . something from which, or within which, all other institutions and associations have their being.[116]

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[114] In this book, the writer often uses the term *fallen* to signify the imperfect state of humanity without Jesus Christ, having resulted from Adam's neglect of God's directives: Adam disobeyed, failing his charge to take dominion (lordship) over God's creation. The term *fallen* translates the Old Testament Hebrew verb נפל (*naphal*). Though the term has an "expanded range of meanings by combination with prepositional specifiers," says Hebraist Milton C. Fisher, *naphal* often indicates "a violent accidental circumstance." 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT 587 (R. Laird Harris et al eds., 1980). Following this sense, writers have used "fallen" to translate the Hebrew *naphal* and to signify the tainted and flawed condition of Adam's descendants: as one falls in battle (*see Judges* 20: 44) or by the hand of an adversary (*see* 1 *Chronicles* 20:8), Adam fell into the "[d]amage, death, and destruction . . . often designated by *nāpal*" and, thereby, has plunged his progeny—body, soul, and spirit—into the same. 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* this note, at 587. The second Adam, however, which is Christ, provides to the individual the means to escape his deplorable condition, i.e., fallen. *See* 1 *Corinthians* 15:47.

[115] *See Genesis* 10:10 *and* ff. From Babylon in Shinar, the Babylonian forms, notions, and administration of religion, law, and government have disseminated to leaven other *kingdoms* (מלכים: *melekhim*), conforming them to her likeness, and holding them under her delusion. See generally §§ 2.1–2.4 of this book (providing background information concerning incipient and developing Babylonian religion, law, and government). Beginning in Babylon, Nimrod's imperial power expanded: infiltrating other kingdoms within the Plains of Shinar (*see Genesis* 10:10), reaching into Nineveh, and down into Egypt (מצרים: *mitzraim*). *See Genesis* 10:11–13.

Babylon exercises her power, not by *initiating* kingdoms, but by *subversion* of already existing kingdoms, countries, nations, and even organizations: infiltration and seduction followed by transformation of established governments, enabling outright subjugation by threat of force. The city of Rome swelled her empire by this method, applying military leverage only after infiltration and seduction. "The thief," said Jesus, "comes not except to steal . . . ." *John* 10:10.

[116] J.L. BRIERLY, THE LAW OF NATIONS 118 (5th ed. 1955) (distinguishing the concepts *nation* and *state*). By contrast, *Acts* 17:28 declares that men "live and move and have their being" in God.

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Differences of opinion about Hebrew grammar cause disagreement over the meaning of *Genesis* 10:8–9. Though seeming ambiguous to some, vocabulary and grammar still limit the possibilities of meaning. These verses, without question, identify Nimrod with notorious rebellion against God: "Cush begat Nimrod, he, the unholy one, to become a mighty man in the land; he became a mighty hunter before the LORD. Therefore it is said, 'As Nimrod, a mighty hunter before the LORD'." For the prepositional phrase, "before the LORD," Young translates, "a mighty hunter *in the face of*[117] the LORD," i.e., flying in the LORD's face. These verses provide the earliest record extant of the first great imperial state, the first great empire, and the first emperor. Nimrod was open and brazen in his designs; though aware of the name and will of the LORD, he pursued his ruthless ambition with a bold front and a high hand. His defiant air gave a new character to *hunting*, which continues to entice men—as Scripture applies the term.[118]

Two explanations for Nimrod's character as a hunter are noteworthy. First, ancient rabbinical texts say that the phrase, "a mighty hunter *in the face of* the LORD," signifies Nimrod's prowess in hunting men. The second explanation is as the first, but adds color: Nimrod hunted and subdued men by telling them that he is their protector, hunting down and riding the land of wild and dangerous beasts. By this boast, Nimrod won the loyalty and fawning obligation of others. In light of Scripture and history, this explanation is reasonable.

Yet today, people are afraid of dangerous beasts, not only in under-developed parts of the world, but also in parts of the United States because where men become sparse, wild beasts multiply. However, God's way of protecting his people from wild and dangerous beast is best because it avoids the demeaning domination of demagoguery and fawning dependence upon the state. For example, God promised Israel that He will not drive the Canaanites from the land all at once but rather, He will remove them little by little, thus allowing the Israelites time to multiply and fill the places the Canaanites have vacated. Otherwise, wild animals will take over the empty land before the Israelites do,

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[117] Hebrew: לפני-יהוה. ROBERT YOUNG, ANALYTICAL CONCORDANCE TO THE BIBLE 81 (1972) (n.d.) (emphasis added). In most instances, the Hebrew preposition ל (*lamedth*) well translates *toward* or *against*. When prefixed, however, as in לפני-יהוה, "in the face of," it captures the same sense but with an enlivened mental image.

[118] צוד (*tzdudth*) and its derivatives, often indicate one who pursues the life of another to destroy it. *See, e.g., Prover*bs 6:26 (of a woman holding power over a man's life and stalking him), *Ezekiel* 13:8 (of a woman scheming by witchcraft to hunt the souls of others). God is against such hunters and frees the hunted soul. *See also* 1 *Samuel* 24:11, *Jeremiah* 16:16.

necessitating driving the dangerous beasts from the land before they can live in it safely:

> I will *not* drive them out before you in a single year, lest the land become empty and the beasts of the field multiply against you. By little and by little, I will drive them out from before you, until you become multiplied and inherit the land.[119]

Thus, men will inherit and have lasting possession of God's land by fulfilling God's covenant, that is, by multiplying and spreading across the land, never by submitting to the self-glorifying domination of a self-proclaimed semi-deified demagogue, boasting that he will be everyone's protector, in which case the land will then be his, given in exchange for his promise of protection.[120]

Nimrod, in defiance of God's method of ridding the land of ferocious beasts by men multiplying, spreading out over the land, and taking intelligent dominion over its resources to God's glory, set out, instead, to establish *his* reputation and glory. Thus, Nimrod billed himself as a sort of beast-slaying protector-hero—a theme to later become popular in medieval Europe in the form of the dragon-slaying hero. Ancient depictions of Nimrod display him as a valiant hunter of dangerous beasts; tradition teaches that Nimrod built the walls of Babylon to keep out the dangerous animals and marauding brigands. The Babylonian settlers enabled Nimrod to enslave them because they were content that he be their protector in place of God.

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[119] *Exodus* 23:29–30 (emphasis added).

[120] See generally § 5.1.11 of this book (pointing out that any general claims of the state's willingness to protect people is unsupported by any real duty enforceable against the state). While the writer was living in Nevada County, California, a mountain cat in the nearby town of Auburn attacked, killed, and partially ate a woman, having been jogging. Her husband then brought a wrongful death action against the State of California for failure to protect his wife from wild and dangerous animals. His action, however, failed, the Jury deciding that the State of California owes no general duty to protect the public from free-roaming mountain cats.

The strongest evidence the defense presented to the Jury was nigh-to-weird: viz., suggesting that which is beyond the natural: clippings from local newspapers bearing pictures of the mountain cat's victim standing in the forefront of a crowd of *save-the-mountain-lions* demonstrators holding a placard. After the attack, officers forthwith commissioned and dispatched men; they hunted down the mountain cat, killed, and dissected it and found parts of the victim's clothing in its stomach. California State's trial lawyers presented this clothing before the Jury in proof of the mountain cat having killed the victim. As told to the writer *by* General Charles "Chuck" Yeager, 30 September 2008, Grass Valley, California.

The name *Nimrod*[121] stems from the root *ma-radth,*[122] meaning refractory: that is, stubborn, obstinate, or resistant—in a word, *rebellious*. "His name," says Barnes, "which literally means 'we shall rebel,' is in keeping with the practice of an arbitrary and violent control over men's persons and property."[123] Scripture, in addition, describes Nimrod as *unholy*: living in profanity (*coal*).[124] The Hebrew *coal* is a near equivalent to our English *profane* (*pro*, meaning "before": i.e., outside of the *fanum*, signifying a sanctuary, temple, or holy place).[125] In sum, Scripture characterizes Nimrod as rebellious, behaving headstrong outside of God's boundaries of holiness, and therefore, without right (authority), a mighty hunter "[flying] in the face of the LORD."[126]

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[121] Hebrew: נמרד.

[122] Hebrew: מרד.

[123] "Nimrod," being in the Niphal stem, is perhaps better taken with the Jussive force: *Come, let us rebel.*

[124] Hebrew: חל.

[125] Medieval Europe called the inside of a local cathedral *fanum*: Latin for a holy place set aside as special. Outside and in front of these medieval church buildings, venders set up open markets to sell their produce and goods. Thus, continental European churches and the areas around them functioned somewhat as courthouses and courthouse squares still function in America: depositories of public records within and places of trade and commerce without. Churches were political centers and depositories of public records, such as family records of birth, death, and marriage. People regarded those things within the church building (cathedral)—worship and family records—to be sacred or *fanum*; the buying, selling, bartering, and trading that occurred outside and in front of (before) the church building, they called pro-fanum or *profane*. *See generally Mark* 11:15–19 (providing an example of profaning the Temple in Jerusalem by trading within its precincts).

[126] *The LORD* (Hebrew יהוה: *Yaweh*, the Hebrew verb of undefined action, "become" or "becoming one") is the name of God stressing His covenant relationships. Scripture uses God's covenant name here because in this context, Nimrod sought to subvert God's covenants. *Yaweh* denotes God as the one delighting to keep His promises or covenants. The three Hebrew characters used in God's covenant name—י (*yodh*) ה (*hay*) ו (*wow*)—are vowel-like, being the only letters of the written Hebrew alphabet the sounds of which do not require a definite blocking of the oral passage: guttural, labial, or using the tongue. Therefore, because these three letters come closer than any letters of the Hebrew alphabet to being vowels, Hebraists called them vowel-letters. Because the pronunciation of vowels require no obstruction of the oral passage, their pronunciation is fluid and, therefore, subject to change. Thus, the pronunciation of the vowels of any particular word will never persist through millennia. Consequently, the ancient pronunciation of *Yahweh* is unknown: *Yohweh*, *Yehway*, *Yhawey*, *Yahwoh*, *Yahwey*, or *Yahwah*? Moreover, "[b]ecause of Jewish dread to pronounce the name, its original pronunciation, derivation, and meaning were lost." HERMAN BAVINCK, THE DOCTRINE OF GOD 102 (1977) (n.d.).

The writer notes, however, that the popular German pronunciation *Jehovah* is not the ancient pronunciation of the Hebrews: *Jehovah* is a mispronunciation of the Hebrew vowel-letters, hardening them into consonants. Nevertheless, due to the domination of German and German-Jewish commentators during the last two centuries, the pronunciation *Jehovah* has become popular. *Yahweh* is the supposed pronunciation of יהוה—the Hebrew verb of undefined action; and though frequently translated as a verb of being (*was, is, are, were*) it is rather a verb of action. Ancient Hebrew is a concrete tongue: thus, *being* is expressible only in its activity.

After the flood, men first dwelt in the plain "called Shinar, God also commanded them," Josephus tells us, "to send colonies abroad, for the thorough peopling of the earth, —that they might not raise seditions among themselves." Though they had flourished with children and therewith were happy, they reasoned against God, that He ordered them to send out separate colonies that they be more easily oppressed:

> Now it was Nimrod who excited them to such an affront and contempt of God. He was . . . a bold and great man, and of great strength of hand. He persuaded mankind not to subscribe their happiness to God, but to think that his own excellency was the source of it. And he son changed things into a tyranny, thinking their was no other way to wean men from the fear of God, than by making them rely upon his own power.[127]

Genesis 11:1–9 describes the first seat of Nimrod's power among men in Babel. Then, *Genesis* 10:10–11 describes how, near at once, in rapid propagation, Nimrod extended his arm of power from Babel into three more cities, from thence building even more cities over the plains of Shinar, and then beyond: "And it was happening, beginning from the kingships of Babel,[128] then Erek, then Akkad, then Kalneh, in the land of Shinar. From that land of Shinar, went forth Asshur and built Nineveh, then the city Rehoboth, then Calah."[129]

Above all, the name *Yahweh* is the self-revelation of God as sovereign and sure keeper of his covenant promises. In *Exodus* 3:14, the LORD God utters the formula אהוה אשר אהוה, repeating the verb *yahweh* in the imperfect form (signifying an uncompleted activity) with the relative pronoun inserted between: "I become who I become." The phrase is good Hebrew, but makes for clumsy English. The name *Yaweh*, writes Rees, "is the personal name *par excellence* of Israel's God." T. REES, *God*, 2 INTERNATIONAL BIBLE ENCYCLOPEDIA (James Orr ed., 1925). Though much remains unknown about God's covenant name, His name *Yaweh* reveals that no force will thwart His purposes.

[127] *See* JOSEPHUS, THE ANTIQUITIES OF THE JEWS 35 (William Whiston trans., Hendrickson Publishers 1987) (c. A.D. 75), bk. 1, ch. 4, paras. 1–2, for a recent translation.

[128] Hebrew: ממלכתו בבל (*mamalaca-tow bavel*: "from the kingships"). The Hebrew text of *Genesis* 10:10–12 swells, at each progression, with action in anticipation of action: Babylon, in her first-strength of conception, is prolific; her offspring cities, each from whence she forever extends her imperial power through her law and government, continue until the end of this age.

[129] Shinar, also called *Babylonia* and *Chaldaea,* lies in the lower part of Mesopotamia, in the country west of the Tigris and south of Is, or Hit, on the Euphrates, and south of Samara on the Tigris. In addition, the following sites help fix the location of Shinar. The ruins of Babel (Babylon) are near Hillah, on the east bank of the Euphrates. The ruins of Erek are also on the east bank of the Euphrates, but about 100 miles southeast of Babel, half way to the confluence of the Euphrates with the Tigris. The place now bears the name Urka, or Warka, appearing as Huruk on the cuneiform inscriptions found there. The ruins

The stuff of Nimrod's rule was raw power, being "a mighty man[130] in the earth": the first man to enact a scheme of statecraft-priestcraft independent of God and designed to dominate men. Thus, according to Jewish and Arabic legend, Nimrod was the first true *emperor*. Nimrod, claiming to have seen the figure of a crown in the heavens—in like manner to that later claimed by the emperor Constantine—, made a golden one like it and put it on his head, enticing others to believe that the powers of heaven gave him the crown, which had bestowed upon him all power and right to rule.[131]

Nimrod was the first to reduce—by means of administration through his cities—whole people groups under tyranny to the single will of an arbitrary state of which he held himself forth as the incarnation. By creating false perceptions of his might and heroics, he obtained the consent and fawning encouragement of the people, usurped power, and held it by force or threat of force; thus, Nimrod dominated. One ought never underestimate the depth of the rebellion of Nimrod, of those tyrants following him, and those to come—it runs deep. "There are some," says Henry, "in whom ambition and affectation of dominion seem to be bred in the bone; such there have been and will be, notwithstanding the wrath of God often revealed from heaven against them."

§ 2.1.2
Nimrod & Civil Law's Sons of the Sun

> *Lest you lift up your eyes toward the heavens and see the sun, and the moon, and the stars—all the host of the heavens—and be seduced, and bow yourself down to them, and serve them.*[132]

The modern Japanese emperor and Louis XIV of France are recent examples of Babylonian scions. As did Nimrod and the pharaohs of Egypt, these demagogues based their imperial power upon claims of solar origin. The Japanese people worshiped their recent emperor as the direct

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of Akkad, or Archad, are in Akkerkoof, north of Babel, about nine miles west of the Tigris, where it approaches the Euphrates; the mound of ruins Tel Nimrud (Nimrod) is also here. The ruins of Kanneh are near Takti Kesra Kalneh. Jerome and the Targum of Jonathan regard Kalno of *Isaiah* 10:9 and *Ezekiel* 27:23 to be the same with Ktesiphon on the Tigris, in the district of Chalonitis.

[130] *Genesis* 10:8. Hebrew גבר (*gabor*), signifying physical power, in this case dominating political power.

[131] Constantine used his claimed vision of the cross for like purpose: to justify his imperial power. Thus, Europe later saw the figure of the crown displayed above the cross.

[132] *Deuteronomy* 4:19.

and preeminent descendant of their common ancestor—or so they believed—the Babylonian sun goddess:

> Nippon, whose literal meaning is "sun origin," sums up the legend about the descent of the Japanese race from the sun goddess . . . The name *Cipango* for Japan which Marco Polo brought back to the West is a Chinese translation, *jê pên kuo* (rising sun land), whence also "Japan."[133]

Thus also, Louis XIV of France called himself the "sun-king," declaring, *L 'Etat, c 'est moi* (I am the State).[134]

The tradition of sun-god worship traces its origin to Babylon. Legend holds that Shem[135] moved men to moral outrage against Nimrod, his doctrines of apostasy, and his brutal despotism reaching out from Babylon; thus, men brought Nimrod to justice and execution.[136] Nimrod's wife Semiramis, ever astute, straightway seized upon her husband's death as political opportunity, insisting that Nimrod's divine rule continued through her because Nimrod, in addition to being her husband, was also her son.

Semiramis thus further justified her demagoguery by claiming that Nimrod was divine only because she, the divine celestial virgin, had conceived Nimrod by the divine power of a sunbeam. Nimrod, she claimed, being *the son of the sun*, was the sun god that had now departed from earth (having rather been executed for his wickedness) to live among his kind: the gods, the heavenly luminaries. Semiramis then took the title *queen of heaven* under the name Aurora and pressed her scheme with two more claims: first, only she, and no other, can communicate with her deified husband-son; second, only through her work as mediator can the divine favor and acceptance (grace) of her son Nimrod be channeled to individual men and women.

This Babylonian tradition of sun-god worship persisted among the Egyptians, substituting the name *ra*, meaning "sunbeam," for Nimrod. The Egyptians worshiped the sun as the source of all life. The Hebrews

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[133] *See* MARIO PEI, THE STORY OF LANGUAGE 60 (1949). The Japanese practice of sun and fire worship traces to Babylon, the common source of sun worship.

[134] *See* DONALD GREY BARNHOUSE, THE INVISIBLE WAR 247 (1965).

[135] Shem was the younger of Noah's two sons Ham and Japeth, likely born in Noah's five hundred and second year, 100 years before the Noahic flood—the flood occurring through the winter and spring of the following year. In addition, Shem's life overlapped Abraham's by 150 years.

[136] Indeed, Shem and Nimrod were contemporaries; their lives overlapped, Shem living beyond the Noahic flood 350 years.

followed this same tradition, paying homage to *the queen of heaven*.[137] According to Persian accounts, Nimrod was the sun god, showing himself during the day as the sun and during the night in the heavens as the constellation Orion.[138] Attalus, the emperor of Pergamos, claimed himself to be a divine luminary ruling on earth: the son of the goddess Venus—the morning star. In Rome, Julius Cæsar, upon stepping into Attalus' shoes as his specific legatee, also claimed descent from the heavenly luminary Venus.[139] Thus, by the foregoing happenings, fundamentals of the civil law have sprung from worship of the created luminaries (heavenly bodies) as gods, of whom devotees deem earthly rulers to be scions.

Though such a scheme of false worship was first successful at Babylon, fallen angels appear to be the first to have promoted it—albeit without success—by posing as semi-deified sons of heavenly luminaries. *Genesis* 6:2 refers to these fallen angels with the phrase *bené 'elohim*: sons of God,[140] a Hebrew phrase denoting God's *direct* creations, which, in this case, are angels.[141]

The following passages, considered in the following sequence, set forth one respectable view of these fallen angels' scheme to obtain worship as heavenly luminaries: *Genesis* 6:2 reveals the motivation for their sin; *Jude* 6 reveals the character of their sin; 1 *Peter* 3:19 and 2 *Peter* 2:4–5 reveal the time of the occurrence their sin; *Genesis* 6:1–4

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[137] *See Jeremiah* 7:18, 44:18, 25.

[138] The name *Orion* for Nimrod and the name *Aurora* for his mother both stem from the Semitic אור (*oar*), meaning "light"; in its more specific sense, the term denotes the heavenly luminaries. The name *Ur* stems from this root and signifies the worship of the sun god by the inhabitants of the city by that name, the city of Abraham's nativity. See generally *Psalm* 139:12, for contextual use of the Hebrew אורה (*oar-a*).

[139] See generally § 2.3 of this book (further discussing the Babylonian tradition of sun worship as it pertains to Rome through Julius Cæsar, specific legatee of Attalus). The Roman emperors claimed to be sons of Venus; images of the emperors in their infancy display them as Cupid. In these forms, the Romans venerated both mother and child.

Attempts to find precise consistency in tracing Babylonian forms of worship from culture to culture through the millennia is nigh futile because the creative practicalities of priestcraft in manipulating the passions and fears of devotees, never sensibleness, drives false religion.

[140] Hebrew: בני אלהים.

[141] *See, e.g., Job* 1:6, 38:7, *Daniel* 3:25, *Luke* 2:38. Luke distinguishes Adam from his descendants in that Adam's life is "from" God direct: *Αδαμ του Θεου* (Adam, the one [direct] from God). The genitive phrase *του Θεου* (the God), signifies a direct giving of life and being to *Αδαμ* (Adam). The Greek genitive case denotes contact and direct association. God created Adam in His likeness (*see Genesis* 5:1); though Adam begat his children in *his* direct likeness (*see Genesis* 5:3), his children were indirect from God. Adam's descendants can become direct creations of God—viz., sons of God—only by the new birth (directly from) God. John, whose Gospel records Christ's presentation of the new birth, so states. *See* 1 *John* 3:1.

reveals the object of their sin (to frustrate the counsel of God as expressed in *Genesis* 3:15); *Joshua* 11:12–22 reveals the lingering effects of their sin. According to *Genesis* 6:4, these angels are *hanephalim*,[142] from the root *naphal*:[143] to fall, hence, "the fallen ones."

The Septuagint translation of *hanephalim* (*οι γιγαντες: oi gigantes*) is inaccurate; Jerome's Vulgate, following the Septuagint's interpretive translation, renders the Hebrew *gigantes*. The earliest English translators of the Bible were without the benefit of any Old Testament Hebrew manuscripts and thus followed the Greek Septuagint and the Latin Vulgate. For example, though Mercian (Middle Anglo-Saxon) was Wyclif's native tongue, he transliterates from the Greek *οι γιγαντες* (*oi gigantes*) and the Latin *gigantes* with *giauntis*: Norman French for "giants." The Geneva Bible of 1556 and King James Bible of 1611 both retain "giants."

Tyndale, however, being the first to translate the Old Testament into English from the Hebrew, translates the Hebrew *hanephalim* in *Genesis* 6:4 with *tirantes* (modern English, "tyrants," from the Greek *τυραννος*)—a bold deviation from convention—likely indicating his conviction gathered from his study of history concerning the tyrannical character of these creatures' government: i.e., they were *tyrants*.[144]

For example, in ancient Greek culture, *oi gigantes* were a semi-deified (half demon-god and half man) race, super human in size and strength. Because these creatures arose from the under earth, they were "earth generated"; thus, the Greeks called them *gigantes* (*γιγαντες*): formed by conjoining the Greek *γη* (*gay*: "earth") and *γενεσις* (*genesis*: "birth"): born as though having *emerged* from the earth, as opposed to having been born from above.[145] Thus is the origin of the English word "giants." Although "giant" came to signify size, originally it signified the under world source and essence of these creatures.

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[142] Hebrew: הנפלים.

[143] Hebrew: נפל.

[144] The Scandinavian name for Zeus was *Tui*, the root of our English "tyrant." The Norseman believed Tui was Odin's son and dedicated the third day of the week to Tui, calling it *Tue's*-day. *See* 1 ALEXANDER VON HUMBOLDT, RESEARCHES IN MEXICO 320 (1814). *But see* R. A. STEWART MACALISTER, THE PHILISTINES: THEIR HISTORY AND CIVILIZATION 79 (1914). "[N]o satisfactory Indo-European etymology has been found for *τυραννος*, so that it may be a word altogether foreign to the Indo-European family." *Id.* Further, *Odin* was the Scandinavian name for Nimrod, Noah's great-grandson.

[145] *See John* 3:3, where the phrase *γεννηθη ανωθεν* (*gennaythay anotheen*) is passive, meaning, "begotten from above": i.e., from "the heavenly world," says Rudolf Schnackenburg, "from whose power a man must be renewed" in order to see and enter the Kingdom of God.

An historical example in Greek culture of these super-human creatures was *Μινος* (Latin: *Minos*) or sometimes, *Μινωταυρος* (Latin: *Minotaurus*), the ancient emperor and lawgiver of the Isle of Crete. According to Greek history, Minos was the son of Zeus and lived just before a great flood. Indeed, the time of Minos' reign in Crete comports with the time just before the Noahic flood as calculated from times and events provided in the book of *Genesis*. Minos was of such great physical stature and strength that the Cretans also called him Mino-*taurus* (Minos the bull). "[A]fter his death, [Minos became] a judge in Tartarus . . . Minotaurus . . . (*Μινωταυρος*), [was] a monster, half-bull, half-man, the offspring of Pasipha and a bull slain by Theseus."[146] Minos was the lawgiver and god of the Cretans: his word was law without appeal.

Peter the apostle, in a related passage, says that God *tarterized* (*ταρταρωσας: tartarosas*, participle meaning "sent to *tartarus*") the angels that had sinned before the Noahic flood.[147] According to *Jude*, these same angels, in adultery, had "gone after different flesh."[148] Tartarus was "the place of the punishment of the Titans, and hence appropriate in connection with fallen angels in 2 Pet [sic] 2:4."[149]

Scripture presents these fallen angels as luminaries that were once wonders to the eyes of men but in rebellion are now fallen from the heavens. It is thus little wonder that Scripture then presents them as attempting restoration to their former wondrous positions in men's eyes by bootstrapping through procreation with the daughters of men in *Genesis* 6:4.

§ 2.1.3
The Tower of Babel: The First Ziggurat

The enormous ziggarats of Mesopotamia could easily have symbolized the presumptuous of the urban elite, and their ruin, the judgment of God.[150]

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[146] *See* CASSELL'S NEW LATIN DICTIONARY 373 (1st ed. 1960).

[147] *See* 2 *Peter* 2:4.

[148] *See Jude* 6–7, "a different kind of flesh": *σαρκος ετερας* (*sapkos etepas*), i.e., of a different kind, in this case, the daughters of Adam.

[149] *See* JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 626 (1930). See, *e.g.*, Septuagint, *Job* 41:24 (*Job* 41:31 in most English translations), for the substantive form *ταρταρον* (*tartaron*), denoting the deep regions (*αβυσσυ: aboossu*, viz., abyss). In Scripture, the *abyss* signifies judgment.

[150] David G. Burke, *Tower of Babel*, *in* THE OXFORD COMPANION TO THE BIBLE 71 (Bruce M. Mettzger & Michael D. Coogan eds., 1993).

Babylon's tower, or *ziggurat*, was the city-state's religious tool for political and economic manipulation and exploitation of people. The spreading duplication and reduplication throughout the earth of Babel's tower or *ziggurat*—old Assyrian for "height": tall pyramid-shaped temples—as a tool of Babylonian religion, law, and government, evinces Babylon's pervasive influence. Migrants to the Plains of Shinar were determined to build Babel's "tower,"[151] constructing "its *top* [garret, loft, or top level] to be *with the heavens*."[152] The Babylonian settlers intended to fashion a tower whose uppermost level held charts of the heaven's bodies and their movements. In addition, studies of other ancient *ziggurats* worldwide have shown such to be the case—these later ziggurats having followed the pattern of the world's first *ziggurat* at Babylon.

After scattering from Babel, the first Babylonians—still in ongoing defiance of God by refusing to range out across the face of the land as God had said—retained their trappings of Babylonian religion, their longing for a protector-emperor to make their decisions. Moreover, on every continent inhabited they congregated to build *ziggurats*: their chief tool of false religion, law, and government to draw mankind to one place and to hold him there—from the pyramids of Egypt to the temples of the Incas and Maya of the Yucatan[153] to the massive abandoned *ziggurats* remaining in the Mississippi Valley. For example, the Cahokia Mounds

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[151] *Tower*: מגדל, *mig'thdol*: formed by prefixing then letter מ (*mêm*: called the מ of place) to גדל (*gathdol*: adjective, meaning "great"), resulting in "the place of greatness" or "the pinnacle").

[152] In *Genesis* 11:4, the inseparable Hebrew preposition ב (*beth*) governs the prepositional phrase "*with* [ב: *beth*] the heavens." *Beth* always carries the locative sense, such as *in*, *with*, and *at*: the fixed position of an object relative to another object—its location and never its directional tendency, inclination, or movement. *Beth*, then, never gives the accusative sense: denoting motion toward something, i.e., "reaching toward" or "up to" the heavens, as many have translated. *See* H.F.W. GESENIUS, GESENIUS' HEBREW GRAMMAR 298 (A.E. Cowley trans., E. Kautzch ed., Oxford Univ. Press 1909). Another understanding of *beth*, say some, is "*in* the heavens." Such an understanding, however, is absurd: the distance to most all heavenly bodies is immeasurable, much less reachable by any man-made tower. Further, of the many ancient *ziggurats* now known, none shows any effort to build it so tall as to put its top among or *in* the stars. The Hebrew text, by its vocabulary and grammar, and *ziggurats* worldwide, by their construction and charts of the heavenly bodies on their upper levels, give clear evidence of the best interpretation of this verse: "Let us build a tower, whose top is *with* the heavens." *Genesis* 11:4. They built the charts of the heavenly bodies *in* and *with* the upper level of the *ziggurat*.

As a rule, the vocabulary and grammar will mark out the limits of any possible interpretation of a passage. To be trustworthy, any interpretation chosen must be within those limits and—as John Wyclif held—if the interpreter must chose between an interpretation contrary to the senses and another which is not, he must chose the interpretation which is consonant with the senses.

[153] *See* PAST WORLDS: ATLAS OF ARCHAEOLOGY 218–19 (Chris Scarre ed., 2003).

located on the Mississippi River flood plain across from the city of St. Louis, near Cahokia, Illinois, though made only of dirt because building stones were unhandy, are alike in shape, arrangement, and purpose to the *ziggurats* (pyramids) of Egypt, testifying to their common origin.[154]

Using the zodiac charts on the *ziggurat's* top level, the priesthood calculated and formulated prognostications, according to the seasonal positions and movements of the heavenly bodies. Thus, by learning the times and seasons of creation, the priesthood hoodwinked farmers and other folk into believing only the priests had special favor and secret knowledge, allowing communication with the gods. Their foretelling aided in livestock and crop production by giving, for example, the best times to sow, reap, and breed livestock. In a word, the priests trafficked in their understanding of the heavenly bodies relative to the earth, all to their great profit.[155] The sun being the chief of the heavenly bodies, sun and fire worship have since been the pervasive characteristic of Babylonian religion. For example, in Egypt, *Ra* was the sun god, whose sunbeams were believed to be life giving. Molech worship and Saturn worship were also manifest in forms of fire worship. Lighting of candles in worship, along with depictions of halos and sunbeams, are indications of Babylon's presence amongst a people.

In summary, the tower of Babel was at once a symbol of state power and a tool of priestcraft. The settlers meant it to hold the population concentrated at the city of Babylon, "lest, they said, "we be scattered over the entire face of the earth."[156] Though the Babylonian settlers knew that God, by his covenant, had decreed their scattering, they set about to fashion the tower for a place of worship and prognostications—a tool of their rebellion against God's decree.[157]

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[154] *See id.* at 230–31. The pyramids in Egypt are likely built during two distinct times: the Great pyramids of Giza, built before the Noahic flood; the step pyramid of Saqqara, the bent pyramid Dahshur, and the pyramid Meidum, built after the Noahic flood. The Cahokia Mounds appear more like the Egyptian pyramids built after the flood. Further, if the Israelites, during their bondage, built pyramids in Egypt, it is unlikely that they built the pyramids of Giza because these are of massive stone, whereas the building material of the Israelites was brick. *See, e.g., Exodus* 5:7, 16. If the pyramids of Giza are indeed pre-flood, then men had attempted to use the *ziggarat* as a tool of worship before the flood. These pyramids of massive stone remain a mystery unless, as some have opined, the builders were the "mighty men of old, men of renown" of *Genesis* 6:4. See generally § 2.1.2 of this book (discussing the meaning of the Hebrew phrase בני אלהים (*bené 'elohim*), the identity of their offspring, and their wicked deeds). *See* E.O. JAMES, THE ANCIENT GODS 81 (2004).

[155] See generally app. 28 of this book (discussing the general diffusion of practical knowledge of the working of nature as the best remedy against priestcraft).

[156] *Id.*

[157] *See Genesis* 1:28.

§ 2.2
Rome:
Babylon's Early Influence

On 21 April 753 B.C. on Palatine Hill, Romulus founded the city of Rome. Babylonian gods, says tradition, speaking through an augur, chose Romulus' brother Remus to be Rome's king; whereupon, Romulus, burning with envy, murdered his brother. Then Romulus, performing elaborate religious ceremonies[158] incident to the city's founding, declared himself the first king of Rome,[159] which embraced those families living about the site of the city.

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[158] Governments always repose upon an acknowledgment—whether expressed or unexpressed, whether right or wrong—of fixed religious principles, even if anti-religious in word. Our own American tradition of common-law government is no exception: witting and unwitting, Americans have predicated law and government upon their religious convictions. The orthography of the term *religion* sheds light upon its meaning in the context of convictions. It conjoins two roots: *re*, meaning "back" or "return" and *ligare* meaning "to bind." Religion is man's commitment in response back to deity. It is a self-binding to a certain course of action, often by the solemnity of oaths in the form of ceremony. True religion is a *return* entrustment, sealed with obedience, from man to Deity.

The Christian religion separates itself from all other religions by distinguishing the Christian's motivation for his return commitment to his God. The motivation to religious acts for the Christian is compelling: Christ first loved His people by accepting the torture and death meant for them; out of profound gratitude, in response, they obey Him. By giving Himself to pay the lawful penalty for sin and then by providing His written record of these promises and deeds, He has perfected (*τελεια: teleia*) His love for His own. By this legal and moral perfection, it was, and remains, impossible that anyone can do any more to improve upon His love for His people. Love manifested in this way, writes John the apostle, throws fear "clean outside" (*εξο: eksee-o*). 1 *John* 4:18.

By contrast, the motivations to religion for the non-Christian are fear of punishment and self-justification. False religion is any commitment to a false god or a wrongly motivated commitment to the true God. In both cases, the devotee is motivated either by a by fear of punishment or by a craving to gain the favor of deity by justifying himself, or by both.

[159] In the eyes of the Babylonian tradition, Romulus's snatching of his brother's kingship from the will of the gods was not usurpation, but rather proof of his greater authority and divinity. Put another way, by murdering his brother Remus, Romulus defeated the will of the gods, thereby establishing the supremacy of his will in the eyes of his subjects. By contrast, no one ever defeats the will of the God of Scripture.

For example, though Cain attempted to defeat the LORD's will to accept his brother Able by overcoming and murdering Able (*Genesis* 4:8), the LORD denied the will of Cain; though Nimrod and the settlers of Babylon determined to defeat the LORD's will for the race of Adam (*Genesis* 11:4) by dominating all others, the LORD scattered them (*Genesis* 11:8); though Pharaoh and his lesser gods of Egypt squared off with the LORD in attempt to stop His will by dominating the Israelites, the LORD, beginning with the lesser and moving to the greater, defeated each of them (*Exodus* 7:17–12:30); and though Saul drove David into the wilderness as an outlaw and hunted him like a mountain cat, intending to murder him, Saul and all his men never thwarted the LORD's choice of David to be king (1 *Samuel* 16:12–13; 2 *Samuel* 2:4). In Scripture and at common law, one man's overpowering of another man's

As was Babylon, the early city of Rome was a religious association. The Babylonian settlers and Nimrod had drawn people into one place and held them there using their tower, or *ziggurat*,[160] coupled with a common religious cultus aimed at fostering emotional and economic dependency upon the city-state incarnate: Nimrod. Rome derived her religion, in kind, from the Babylonian mystery cults and using the veil of priestcraft, kept it shrouded in secrecy.[161] Thus, Rome likewise set up its own special city religion, including the gods of the city common to all Romans, elaborate rituals, and a corps of city priests over whom the Roman king was chief or high priest. The beginning of Rome was comparable to the beginnings of other cities of that period, and after the pattern of Babylon. Associations of large patriarchal families, each comprising kith and kin, servants and followers aplenty, gathered around the area of Palatine Hill, formed Rome, and became her first citizens.

Rome's religion soon developed into a priesthood hierarchy of three levels: the priests of individual families, the priests of groups of families, and three supreme priests of their three supreme gods: the planet Mars, the planet Jupiter, and the king of Rome. The priest of each family mediated between that single family and the priest of the family group; the priest of the family group mediated between his group and supreme priests of Rome's heavenly gods. The planet Mars and the planet Jupiter each has its own priest; the king of Rome, however, was not only held to be the chief god—i.e., a heavenly luminary, as are Mars and Jupiter—, but also to be his own priest. Because the king of Rome differed from Mars and Jupiter in that he was a heavenly body come to earth, he claimed to be the greatest of the three gods.

The family patriarch, called *pater* or *patrician*, was the priest of each family, which maintained its own secret religion and ceremonies: secret rituals in worship of the family's private god, or gods, known only to those of that family cult and held in family confidence. Nonetheless, the differences among the Roman families' worship consisted only in minor idiosyncrasies. The secret family ceremonies, therefore, were the same in fundamental form and substance because they grew from a common trunk—the mystery cultus of Babylon. In addition to being the family priest, the *pater* (patriarch), being the senior male of each family, held

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will is no sign of any man's authority or right to do so. God is not only the fountain of all authority; He also provides the evidence of all authority.

[160] *Ziggurat* is the Assyrian term for height or pinnacle. See generally § 2.1.3 of this book (discussing *ziggurats*).

[161] The basic forms, fundamentals, and often-even trappings, of the Babylonian cultus have remained unchanged throughout the world, where men practice the mystery religions.

absolute power over the other members of his family, numbering as many as one thousand, including servants.

By the time Romulus founded Rome, the founding families were no longer nomadic. Each family lived on its own estate amd held in common the city of Rome for the sacred place of worship, the sacred place to be worshiped, and the sacred place from which those being worshiped (the high-priest king and his agents) exercised government and extended their power. The precincts of the city of Rome being holy to the Romans, only the king, a few priests, and certain city officials lived in the city proper. Roman power, in Nimrodian fashion, tended toward total control of religion, economics, money, business, and military might. Thus, Rome became a religious center of worship, marketplace, headquarters for business, and place of assembly for discussion of military affairs and command of military forces. Consequently, Romans visited Rome only on religious, marketplace, or military business.

Each of the approximately three hundred original families of Rome grouped itself into one of thirty separate *curies*. Each *curia* was a religious association also having its own god, headed by its own priest called *curio*, and attended by its peculiar religious ritual: again, all in like Babylonian form, but varying in certain details. Each *curio* acted as chief priest of his *curia* under the title *flamen*. Each flamen, being the priest of his *curia's* god, was subject also to the *flamen* (priest) of each of the three dominant gods of the city: flamen *Dialis* of Jupiter, flamen *Martialias* of Mars, and flamen *Quirinalis* of Romulus.[162]

At all three levels of ritual worship—family, curia, and the city—, the Romans took pains to guard the secrecy of their cultic rituals by conducting them in special-devised tongues or codes known only to that family or curia and its priest, much as secret religious fraternal

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[162] The Latin term *flamen* (wind) signified the spirit of a particular god personified in its priest. As the founder and imperial king of Rome, Romulus ranked among the highest deities of the pantheon and as flamen of the dominant gods, of which he was one. "[T]here were three flamines maiores [Latin for *major*], Dialis *of Juptier* (the highest in rank), Martialias *of Mars*, and Quirinalis *of Romulus*, and twelve flamines minores (Vulcani, Florae, etc.)." CASSELL'S NEW LATIN DICTIONARY 249–50 (1st ed. 1960). *Quirinus* was the name of Roman god of war, and thus identified with Romulus, the commander in chief. Thus, when—in the spirit of Greek democracy—the Romans later deified *the people*, the Romans called the people *Quirites*: whether signifying the people collectively (*'o δεμος: ha demos*) or denoting a majority group of citizens.

If the reader finds the Roman's use of religious-political terms and categories confusing, he does well to remember that Babylonian religion, law and government, in spite of its quest for precision of thought and total control, remains complicated, enfolded, and confused because its foundations are less than true, i.e., always a few bubbles off plumb. Truth, at its foundation, is always simple and straightforward; error, being false founded or even unfounded, is unstable, confused, and crooked.

organizations do in modern times. In view of their hidden meanings, some believe that the early Romans called these secret languages, or cryptograms, *Latin*—from an ancient root meaning "hidden." Albeit others, noting that *Latin* (the name of the Romans' ancient language) and *latus* (the Roman word for "plain") sound alike, say that the term Latin derives from *latus*. However, hasty attribution of like-sounding words—such as *latus* and Latin—to a common root is an unreliable method of reaching a term's origin and tracing back its etymology.[163]

The weightier evidence suggests that the more ancient and fundamental meaning of *Latin* is "hidden" or "veiled": signifying the unintelligible utterances of the ancient *pontificate* (the family patriarch functioning as family priest) in reciting ceremonial incantations. In later centuries—after Latin became the common tongue in the Western Empire and then fell from common use as the Roman culture seeped northward—the imperial Roman Church retained Latin as the language of church-state ceremony and law, even amongst those northern tribes and people having never known Latin. Thus, after Latin had fallen into general disuse in the West, it remained intelligible only to the Roman priesthood, schoolmen, and civilians (civil lawyers), who continued to conduct its ceremonies, university education, government, and legal proceedings in Latin. Except during Latin's ascendancy as the common tongue in the first-few centuries of the Christian era, the Latin language has veiled, to the uninitiated, the meaning of the Roman priesthood's ceremonies and law.[164]

The written laws of the early Romans, as far as there were any, were interspersed among regulations of religious ritual tucked in the texts of the sacred books, which were kept secret—accessible only to the imperial king and other priests. Some claim the biblical books *Exodus* and *Leviticus* are akin to these. The sacred Roman books differ, however, in that God gave *Exodus* and *Leviticus* for dissemination, public declaration and teaching, to be open to all, and never to be secreted behind shrouds of priestcraft. By contrast, the Babylonian-Roman mystery cults—now as

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[163] "Vermicelli," said American Orientalist William Foxwell Albright, "has no linguistic relationship to wormy celery, nor does asparagus to spare grass." Latin and *latus*, by sounding alike, have lead some to believe that both terms stem from a common root, but such likeness alone, says Albright, is inconclusive, being weak.

[164] During the time of Henry VIII., the unintelligibility of the Latin mass to all but the priesthood led to the well-known incantation *hocus pocus*, spoken in playful imitation of the priesthood's phrase, *hoc est corpus meum* (this is my body), purporting to mysteriously transform the bread and wine into the real body and blood of Christ. *See generally* THOMAS AQUINAS, SUMMA THEOLOGICA, pt. III, qu. 75, art. 7, reply obj. 3, for the medieval view of the Roman mass that has remained.

then—continued in secrecy: interpretation of their sacred writings and ceremonies allowed only to the initiated elite: the Roman priesthood.

Consequently, early Roman priestcraft confined reading and writing to the priesthood, which included the imperial king as high priest and final judge of any disagreements.[165] Thus, early Roman kings held final power of law's interpretation and application, deciding disputes between families—after consultation with the municipal gods and the sacred books. The king was also the army's commander-in-chief, the city being a military association as well as a religious community. On occasion, the king of Rome called the thirty *curies* into an assembly in order to make announcements or issue commands.

The patriarchs (heads of Rome's founding families called *patricians*) made up the senate (Latin *senatus*: aged men), which advised the king. Unlike the Anglo-Saxon kings, however, the Roman king was imperial, a near-absolute monarch without generally known and well-marked limits to his power—albeit with one clear exception: Rome's kings never had power to command an hereditary monarchy. Rome's founding king Romulus intended a hereditary monarchy, but after he had reigned thirty-seven years, and before he had pressed the notion, the senators (the assembly of patriarchs) assassinated him.[166] After that, the assembly

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[165] History shows that Christianity brings two benefits to wide use: writing and reading. Early English (Anglo-Saxon) stayed an oral language only until the arrival of Christianity, when King Alfred the Great fashioned an alphabet and put Anglo-Saxon to writing in order to translate the Scriptures for reading.

[166] In common-law countries, the executive exercises government power at the advice and consent of the governed and is subject to impeachment. The availability of impeachment and dismissal from office discourages assassination. Thus, political murder is alien to our tradition; early Americans held assassination to be foreign to the American mind as a political remedy. "Assassination," wrote Secretary of State William Seward in 1862, "is not an American practice or habit, and one so vicious and desperate cannot be engrafted into our political system." JAMES L. SWANSON, MANHUNT: THE TWELVE-DAY CHASE FOR LINCOLN'S KILLER 99 (2006).

Seward was correct in believing that it was impossible to engraft assassination into American common law and government because assassination will never coexist with common-law convictions. Assassination, however, will trespass upon common-law convictions. Though assassination has never established itself as a custom in common-law countries, assassination has crept in as men ignore the principles of common-law government. On the evening of 14 April 1865—the same evening and at the same time Booth assassinated President Lincoln—, Lewis Powell made a desperate attempt, but failed to assassinate Secretary Seward.

In view of our present war with Islamic terrorists, it is of contemporary note that our English has derived *assassin* from the Arabic *hashish* (English "hemp," and in American Spanish or "Mexican," *marijuana*: translated into English with "Mary Jane"). The Arabic uses *hashshashin* (*hashish* users) to signify Islamic abusers of *hashish*. The rough breathing demanded by the Arabic equivalent of the letter *aleph* of the Arabic *hashshashin*, being unnatural to English speech, resulted in "assassin." During the Crusades, a secret sect of Moslems devoted themselves to the influence of *hashish* in order to deaden natural

of *curies*, acting with the senate, elected the next six kings of Rome; though each reigned for life with unlimited power, the Roman senators resisted them often.

Roman citizenship and its privileges required proof of two qualifications: one must be descended from a member of one of the founding households of Rome and be a practicing member of one of Rome's thirty *curia*—Rome's religious associations one level above the family unit's worship, each curia associating about thirty families. Roman citizenship, therefore, was a matter of blood descent and ongoing religious practice. Because Rome's privileges of citizenship depended upon initiation into the secret religious cultus of one of founding families, these privileges were, in that sense, religious privileges. Because Rome was a successful city, outsiders moved to Rome. Because these newcomers, called *plebeians*, were unassociated with any founding family, the Romans debarred them from the curies, thus excluding plebeians from religious and legal privileges: Roman law forbade plebeians from entering the temples, owning land, contracting marriage, suing at law, holding public office, participating in the assembly of curies, or otherwise enjoying the law's protection.

Even though one claimed descent from one of Rome's founding families and associated with a curia, his enjoyment of the benefits of Roman citizenship required the priesthood's acceptance (grace), which flowed only through the channels of priestcraft.[167] Put another way, the priesthood dispensed its grace only to descendants of the founding families, only as these kept in good standing by ongoing participation in the religious ceremonies of a curia, but only if the priesthood, in its imperious breath, said the gods approved. The priesthood of the curia, therefore, were the ultimate gatekeepers to the fellowship of the city (citizenship) and its blessings of urbane law and life under the power of

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aversions, while, in stealth, murdering Christian leaders. Violent assassination has long been a foundation of Islamic culture because the writings of Islam's venerated prophet Mohammed encourage murder of any refusing to accept him—impeachment and a limited government being no part of Islam.

[167] According to the Babylonian tradition, men will receive deity's acceptance (grace) only as deity channels grace to the individual through submission to priestcraft and the priesthood—the caste claiming the power of mediator between deity and man. Roman religion retains this doctrine, claiming that God's grace is available only through the priesthood as the worshipper submits to the priest's administrations one of the seven Roman sacraments. But see 1 *Timothy* 2:5, where the apostle's use of the genitive case identifies Christ Jesus as God, and his vocabulary identifies Christ Jesus as man. Only Christ Jesus, being both God and man, qualifies as mediator between God and men because Christ is the only man having full identity with both.

the city-state's chief god incarnate: the king of Rome. From this fellowship, Roman law barred plebeians.

The sixth and seventh kings of Rome, seeking the plebeians' (newcomers') political support, tried to extend to them the privileges of citizenship, but the Roman senate (*patricians*: patriarchs of Rome's founding families) blocked these attempts. When Rome's seventh king Tarquinius Superbus persisted in pressing for plebian citizenship and rights, the Roman senate deposed him and transferred his military and political powers to two *consuls* elected annually by the *comitia centuriata* for a one-year term. The *comitia centuriata* was the assembly of Rome's militia—able-bodied citizens, fit for military duty—, operating with the agreement of both the assembly of curies and the assembly of patricians or senate. As a matter of form, these changes were a helpful development, but Rome proved unable to maintain them.

Once the Roman assembly of voters reached about 60,000 souls; individual participation became impractical. The Roman senate, still comprising the patricians or heads of the about 300 founding families of Rome, lacked any ultimate legal power—doing no more than advising the emperor-king, which added little to stability. Further, checks on the power of provincial governors were nonexistent. Even though the senators descended from Rome's founding families, provincial governors made wealthy by their positions of unbridled power returned to Rome from their appointments in other lands and used the economic power of the wealth stolen from their former subjects to force Roman senators from their lands and estates. Thus, in time, descendants of the founding Roman citizens, including the senators, became uneducated slum dwellers. In all areas of Roman life, graft, corruption, and abuse of economic power dominated.[168]

In 90 B.C., because of unjust treatment, a number of cities on the Italian peninsula revolted. In response, Rome was shrewd: by granting citizenship to the inhabitants of all Italian cities, she overcame their discontent, while increasing Rome's much-needed tax revenues. Nevertheless, because the city of Rome was the only polling place in the Empire, as a practical matter, one's physical presence in or near the city of Rome was necessary to enjoy any political influence in Roman

[168] In A.D. 40, Romans re-elected a horse to the office of *consul*. Though historians have never found any direct record of the animal's first election to office, those supporting the horse's re-election ran him on the alleged record of his previous term, boasting that the horse was the only Roman official that had never accepted a bribe.

government.[169] As evermore-frequent open and hostile rebellion broke out, only the one commanding a powerful army quelled revolt.

§ 2.3
Pergamos
Deeds Babylonian Power to Rome

[Pergamos] was the residence of a dynasty of Greek princes, founded after the time of Alexander the Great, and usually called the Attalic dynasty, from its founder Attalus. This Attalic dynasty terminated in B.C. 133 when Attalus III., dying at an early age, made the Romans his heirs . . . The sumptuousness of the Attalic princes had raised Pergamos to the rank of the first city in Asia as regards splendor. It became a city of temples, devoted to sensuous worship . . . being in its origin, according to the pagan notions, a sacred place . . . [T]he serpent was its characteristic emblem and object of worship.[170]

Before Rome stood on Capitoline Hill, the city of *Saturnia*—named after the planet Saturn, the Babylonian god—occupied Rome's present location. Virgil visited the site of Saturnia's ruins with an ancient Italian king, and later recorded Æneas' observation, "Then [we] beheld two piles of ruins . . . the remains of Saturnia and Janicula . . . ."[171] The city of Saturnia was prolific in its public display of idols and the sensual excesses, chaos, and confusion characteristic of idolatry. The first settlers of Rome attributed *Saturnia's* destruction to the weakness her idolatry fostered. Appalled at the former demise of Saturnia, Rome forbade public idol worship:[172] during the first 170 years following the founding of Rome

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[169] At the inception of the United States, some political theorists foretold her doom, saying never before in recorded history had a people been able to gather votes over such a wide geographic expanse as the thirteen original Colonies comprised, without suffering voting fraud. Though America did succeed as a country, the threat of voting fraud remains real, as elections continue to reveal. We need never worry, however, because our common-law tradition of government depends not upon the integrity of the ballot box to insure liberty. At best, the ballot box reveals the only the majority will of those willing to vote; which in the United States generally means the majority will of much less than the majority.

Since the presidential election of 1960, with its approximately 20,000 ghost votes that turned up from Cook County, Illinois graveyards, people downstate say that if a fellow wishes to remain politically active after his demise, he need only ask his family to bury him in Cook County.

[170] WILLIAM SMITH, SMITH'S BIBLE DICTIONARY 512 (1967). *See also* WILLIAM SMITH, SMITH'S CLASSICAL DICTIONARY 542 (1891).

[171] *Æneid*, lib. viii., ll. 467–70.

[172] Though the founding Romans were pagan, they saw, understood, and took an action against the dangers of sensual excesses. For like reason, from the advent of American rock-n-roll through the 1980's, communist Soviet leaders outlawed possession or sale of recordings of rock music singers. See generally § 5.1.2 of this book (discussing *Romans* 2:14–15, the universal and individual capability of men to discern right from wrong, but

in A.D. 753, says Plutarch, she forbade even the public display of images and idols.

About 170 years after Rome's founding, however, a colony of Etruscans settled near Rome and practiced, in their settlements, public idolatry. The Etruscans, having long inhabited the western Italian peninsula, were earnest devotees of the Chaldean (Babylonian) system of idolatry, law, and statecraft. The Romans, having forgotten the reasons for their prohibition of public idolatry, incorporated the Etruscan colony into Rome's fold, while also lifting the bar against public use of Babylonian idols.

The Etruscans were also educators, devoting their academic institutions to supporting their religious and political convictions, which gained a fashionable reputation among the Romans; increasingly, wealthy and influential Romans sent their children to the Etruscan academies to be educated.[173] Thus, the Etruscans indoctrinated future leaders of Rome in the finer mysteries of Babylonian religion and life, law and government. As a result, within a few generations, the Babylonian system of public idolatry and its excesses had renewed its hold on the area of Capitoline Hill once called *Saturnia*, now called Rome—but this time, full-blown, that is, with the sophistication of academic prestige in justification.

Later, during the century just before the Christian era, the seat of the Babylonian priesthood and legal tradition officially transferred to Rome and Julius Cæsar appropriated it; after which Octavian exploited it; then, during the centuries following, Rome became the center from which Babylonian religion, law, and statecraft disseminated over the face of the globe. Erstwhile, however, during the first three centuries of Rome's existence, the hub of Babylonian culture, having removed from Babylon, lodged in the city of Pergamos, in Asia Minor.

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their utter inability, by their own power, to defend against the wrong and maintain that which is right).

[173] *See* KENNETT'S ANTIQUITIES, pt. ii, bk. ii 67; ADAM'S ANTIQUITIES 255 (n.d.); 3 CIRERO, DE DIVINATIONE, lib. I, ch. 41, 34–35; 1 LIVY, lib. iv, ch. 4, 260. Every education institution will exist for the unifying purpose of teaching a particular view of the created order (a worldview) to serve as a universal standard that provides meaning to any particular fact taught; if that institution fails to identify and hold to such a standard, it will disintegrate for lack of a unifying ideal. Thus also was the design of Rome's universities, with Justinian's Code as the universal standard.

King of Pergamos Deeds the Seat of Babylonian Priestcraft-Statecraft to Rome

Babylon regarded her priesthood much the same way as first-century Jerusalem regarded her Jewish priesthood after the Jews had returned from their Babylonian exile to Jerusalem with their Babylonian Talmud,[174] lawyers, and scribes: her priesthood was the intellectual repository of her Babylonian religion, law, and statecraft. Transfer of the Babylonian order's center of priestcraft-statecraft from Babylon, through Pergamos, and finally to Rome, occurred as follows.

Upon the end of the emperorship of Belshazzär in 539 B.C., the Medo-Persian emperors, straightaway, occupied Babylon and attempted a clean sweep of Babylonian culture—with its religious, legal, and government administrative methods—from the city by either exiling or executing her the entire priesthood. The priesthood of Babylon, however, one step ahead of capture, fled to Pergamos in Asia Minor and set about to establish the city of Pergamos as the center of Babylonian culture and education. "The defeated Chaldeans," writes Hebraist Barker, "fled to Asia Minor, and fixed their eternal college at Pergamos."[175]

In later centuries, as Rome expanded her empire, she pressed upon the city-states in the paths of her advancing frontiers and sought to

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[174] The Talmud (תלמוד: *talmoodth*, to learn) embodies the civil and canonical law of the Jews that forms the foundation of Jewish religion. Babylonian in spirit and character, the Talmud and accompanying writings rest not upon Scripture, but upon abstract hypothetical legal examples and scholastic-like reasoning.

[175] BARKER WILLIAM BURCKHARDT BARKER, LARES AND PENATES OF CILICIA 232 (1853). *See Revelation* 2:12–13: "And write to the messenger of the church in Pergamos, I know where you are residing, where Satan's throne is . . . where he resides." The doctrine of the Nicolaitans had infected the church at Pergamos. Precisely what this doctrine was, however, has remained in dispute since at least the second century, though it must have been a doctrine of the Babylonian priesthood lodged there.

The absence of the Nicolaitan's teaching from the history's record drives the investigator to consider the etymology of the name *Nicolaitan*: formed by joining *νικαω* (*nikao*) with *λαος* (*laos*). According to this view, these compounded terms forming *Nicolaitan* signified a division of God's people into two classes: the caste *nikao* (meaning "to conquer" or "conqueror," i.e., a priest), which dominated and exploited the *laos* (meaning "the people" or "laity"). *See also* THE GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT, *also known as* GRIMM'S WILKE'S CLAVIS NOVI TESTAMENTI 426 (Joseph Henry Thayer trans., photo. reprint 1977) (1901).

Even if one rejects that the foregoing view of the Nicolaitans, Scripture does teach that God's people are never to divide themselves into two classes with one class dominating and exploiting the other. No one is to accept veneration from another that is due to Christ. "But you, do not be called rabbi," said Jesus, "for one is your master, even Christ; and all you are brothers." *Matthew* 23:8. After the power of Babylonian priestcraft and statecraft lodged in Rome, the city of Pergamos continued as a center of Babylonianism. In A.D. 29, Pergamos became the center of emperor worship in Asia Minor, by being the first city in Asia to construct a temple devoted to the worship of Augustus (Octavius Cæsar).

incorporate them. One by one, these city-states joined Rome's empire, either under threat of force or in response to direct force. Pergamos also felt Rome's threat, but held out until Pergamos's last king, Attalus III, foreseeing Rome's unavoidable domination of his city-state, thought it prudent to give his city, dominions, and subjects over to Rome peaceably. Attalus, however, was shrewd: he deeded his power and his Pergamos to Rome by last will and testament, i.e., to be effective only at his death, thus prolonging his position and power.[176]

The possession of Pergamos and all she claimed now vested in Rome removed Rome's need to wage an expensive military campaign and siege against Pergamos. Rome need only wait, but not long: Attalus's death came at an early age in 133 B.C., transferring Pergamos into the fold of Rome—*fiat* accomplished under his testamentary devise. Thus, as a technical matter of Roman law, upon Attalus's death, the combined powers of Roman priestcraft and statecraft received preëminence over the Babylonian pontiffs of Pergamos; as a practical matter of action, however, more than eighty years passed before Julius Cæsar began to appropriate Attalus's divine prerogatives.

Upon becoming emperor of Rome in 48 B.C., Julius Cæsar saw his chance to exploit the testamentary bequest of Attalus III; knowing that Attalus's gift had worth only if taken and used, he methodically set about to do so. Cæsar first sought Roman deification as *a son of god* (small "g"). Recognition as a son of god, in turn, made him *pontifex maximus*: theoretically concentrating in one man (Julius Cæsar) the combined powers of heavenly deity and total earthly government: viz., the state. He then went about to commend these changes to the people by displaying them in word and action. Thus, began the practical shift of the seat of Babylonian priestcraft to Rome. In short, Cæsar occupied the field of Babylonian prerogatives; as supreme semi-deified sovereign on earth, he tolerated no equals.

Julius Cæsar then hastened the perception of the people that the transfer of the Babylonian prerogatives from Pergamos to Rome was real. He argued that since Attalus, king of Pergamos, had bequeathed Pergamos and all her claimed power and dignity to Rome; and, since

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[176] "On the death of Attalus III (133 B.C.), the kingdom passed, by a bequest of his will, to the Romans." SIR WILLIAM SMITH, SMALLER CLASSICAL DICTIONARY 218 (1958). Iceni, British king of East Anglian, did as Attalus III, but with greater foresight for his descendants: "Hoping to save his kingdom and family from molestation he had appointed Nero, who had succeeded Claudius as emperor, as heir jointly with his two daughters. 'But,' says Tactitus, 'things turned out differently. His kingdom was plundered by [Roman] centurions . . . .'" CHURCHILL, *supra* note 62, at 17, *quoting* TACITUS, ANNALS (G.G. Ramsey trans., n.d.) (A.D. 117).

Rome personified herself in the Roman emperor, he now held personal claim to the divine Babylonian dignity of Attalus. Upon further doing his homework, Julius Cæsar learned that Attalus had claimed to be the son of the goddess Venus, the bright and morning star.

Cæsar then claimed heirship to this divine title and dubbed his family line with the slogan *Venetriz Genetrix*: Venus is the mother (*genetrix*: "female generator") of the Julian race.[177] As a crowning addition upon his inherited position, on special occasions Julius Cæsar donned the scarlet robe of supreme statecraft, like unto that of Belshazzär, the Babylonian emperor; and the headdress of supreme priestcraft, like unto that of Dagon, the Babylonian deity.[178] Over the next 200 years, the world evermore recognized the divine dual Babylonian powers of statecraft and priestcraft, previously centered in Pergamos, as vested and merging in the persons of the Roman emperors. Though never pulled off in his short life, Cæsar thus sought unlimited imperial power.

In summary, for her first-170 years, the city of Rome outlawed the public display and worship of idols in an effort to reduce the resultant public decadence and general disorder;[179] the Romans also developed a

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[177] "Julius Cæsar," says Smith, "was deified after his death . . . and the example thus set was followed in the case of other emperors." *Apotheosis*, *in* SMITH'S DICTIONARY OF GREEK AND ROMAN ANTIQUITIES (London, John Murray 1882), *quoted in* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 55 (1974). It is more-accurate, however, to say that the Roman senate, following its post-mortem consideration of Cæsar's life and deeds, *recognized* and ratified his claim to deity in the same fashion that Rome recognizes sainthood following the candidate's death.

[178] דגון (*dagon*): Middle and East Semitic for *fish*. *See generally* GESENIUS' HEBREW GRAMMAR, *supra* note 152, at 2–7, 24–31 (presenting an overview of the relationship between and among the Canaanite, Semitic, and Babylonian alphabets and tongues, including the term *dagon*). *See, e.g.*, 1 *Samuel* 5:1–7. See also R.A. STEWART MACALISTER, THE PHILISTINES: THEIR HISTORY AND CIVILIZATION 100 (1914), for Jerome's view that דגון (*dagon*) is compounded from דג (*dag*: fish) and ין (*yon*: sorrow): meaning, "fish of sorrow—owing to the burdens of idolatry. Dagon was a merman. The headdress of the priests of Dagon is tall and shaped in the crude form of a fish's head with its open mouth gaping upward as it sits on the wearer's head. *See generally* 1 *Samuel* 5:2–7 (providing information concerning the worship of Dagon, the Babylonian deity). The gods of Babylon and their trappings signify that which is antagonistic to God:

> Bab´ylon, in the Apocalypse, is the symbolic name by which Rome is denoted . . . The power of Rome was regarded by the later Jews as that of Babylon by their forefathers (comp. Jer. li. 7 with Rev. xiv 8), and hence, whatever the people of Israel be understood to symbolize, Babylon represents the antagonistic principle.

WILLIAM SMITH, SMITH'S BIBLE DICTIONARY 68 (1967).

[179] History attests that public decadence accompanies public idolatry: temple prostitution, public drunkenness, public drug use, and other indecencies. In Augustine's day, public decadence in Rome ran rampant, with over 1000 prostitutes plying their trade on Rome's streets—the holy city—and in her temples at any given time. Over 2000 years

system of law and government that they, by nature, thought best. Even though Rome had outlawed the public display of Babylonian idols (statues and images), heads of individual families still carried on the secret Babylonian mystery religions with all deliberate vigor at the family level. As goes the family, so goes the country—not the other way around. Therefore, after Rome had removed the restrictions against public idol worship—open acknowledgment of the Babylonian gods—those young Romans the Etruscans had indoctrinated were grown and gravitating into positions of power over the direction of Rome's religion, law, and government. Babylon's system of idolatry again became the controlling public force in the region of Capitoline Hill.[180]

§ 2.4
Cities:
The Babylonian Order's Central Trait

In the spirit of the civil-law, the Greeks and the Hellenized Romans called any of their chief cities the metropolis, or "mother city,"[181] *as though the city was the womb that gave birth to all else good. Those matters pertaining to the metropolis, the Latin speaking Romans gave equal dignity, calling them "metropolitanus."*

The Roman Empire consisted in the city of Rome's domination of people living in vast rural territories; her tool of domination was her civil law, which is *urban* law: i.e., fashioned foremost for efficient control of city populations. The city is the central place of civil law and government. The city of Rome was the glory of Rome; Rome believed—as had Babylon and the cities of Egypt—that reproducing herself as a city extended the reach of her civil law's long arm, thereby multiplying her success. To Rome, the building of cities was a simple matter of legal logistics.

Therefore, as Rome extended her empire into newly conquered territories, she adopted an urban strategy to hold and govern there: she planned and built cities intended to function as miniatures of the city of Rome in every respect, including ready employment of Rome's urban religion, law, and government. The emperors' capricious power over the city of Rome was to flow to the governors of Rome's newly built cities in

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after Rome reintroduced the public display of idols, the resulting public decadence in Rome, had, if anything, grown, shocking the conscience of Martin Luther and planting the seeds of doubt in his thinking about the authority of Rome.

[180] "A dog shall return to its own vomit," states Peter the apostle, "and a hog shall wash in a mud wallow." 2 *Peter* 2:22, *quoting Proverbs* 26:11.

[181] Greek *μετροπολις* (*metropolis*).

newly conquered territories. For example, while the Roman governor Festus was "sitting on the seat of judgment" in Cæsarea, Paul the apostle, standing before him, said, "I stand at Cæsar's judgment seat."[182] From these new cities, the governors were to extend civil law and Cæsar's domination over the vast rural expanses of Rome's empire. Rome, by her emperor, therefore, governed the diverse nations of her empire from her cities, using law tailored to urban populations:[183] imperial, arbitrary,[184] administrative, and above all, fashioned for efficient execution of the emperor's will.

Rome's strategy of building cities in order to enhance efficient execution of the imperial will was nothing new. Long before, Nimrod, after founding the city of Babel, had extended the reach of his imperial will to the grounds around Babylon and then out onto the Plains of Shinar, founding Erech, Accad, and Calneh.[185] Thence, from the Shinar Plains, "Asshur went out and built Nineveh—even with broad city streets[186]—, and Calah, and Resen, between Ninevah and Calah: it is the great city."[187] Though Babylon was not the world's first city,[188] she was the first city to breed, in organized earnest, her imperial religion, law, and statecraft. Babylon's offspring cities then came forth from her womb, in her likeness. Egypt, more than any other, elaborated the Babylonian system of cities, which then further spread around the Mediterranean.

For example, Egypt's pharaohs, by strategy akin to Babylon's, built cities from which to administer their totalitarian régimes. Scripture describes these cities as depositories to which the Egyptian emperor gathered his material wealth and from which he displayed his military power. Much as the Babylonian settlers had collected themselves into a city, demanded total allegiance to that city-state, obedience to its imperial head, and the building of like cities to its service; in Egypt, Pharaoh received all the land from the people and then "removed them to cities, from one end of Egypt's borders to the other."[189]

Pharaoh dominated and enslaved the Hebrews into the state's labor force, and used them to built his cities as tools calculated to further

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[182] *Acts* 25:6, 10.

[183] *See generally* DAVID MACAULAY, CITY (1983) (focusing on Roman efficiency in city planning and the essential quality of that efficiency: urban organization and urban law).

[184] See generally § 4.3.2.2 of this book (distinguishing between discretionary, arbitrary, and administrative acts).

[185] *See Genesis* 10:10.

[186] Hebrew ואת־רחבת עיר: by the letters, "and even the broad places of a city."

[187] *Genesis* 10:11.

[188] *See Genesis* 4:17.

[189] *Genesis* 47:21.

intimidate, dominate, and enslave. For example, the Egyptian Pharaoh used fear-mongering to motivate the Egyptians "to the end that"[190] the Egyptians "might *humiliate*"[191] the Hebrews through two means: by setting "tax collectors over them"[192] and by forcing the Hebrews to build Pithom and Ramses, "cities of government administration for Pharaoh."[193]

Likewise, the emperors of the ancient city of Rome—craving efficient forcing of their will and ongoing domination of their subjects—followed the proven strategy of absolutist regimes such as that of Babylon and ancient Egypt: duplication of cities throughout Rome's empire. This strategy enabled Rome to raise her empire to even greater levels of despotic efficiency.[194] The city enabled concentration and duplication of

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[190] *Exodus* 1:11. למען (*la-ma-an*), the Hebrew term translated *to the end that*, prefixes the preposition ל (*lamedth*: meaning "toward" or "for," signifying purpose) to מען (*ma-an*: signifying a response). The resulting term, *la-ma-an*, connotes a reaction in response to an action or a result motivated by a certain purpose, thus, "to the end that."

[191] Hebrew מסים (*miseem*): from the root מס (*mis*), which, as a plural noun means in general, *tax*, or in particular, *tribute*; however, the singular form (מס: *mos*) means, "a discouraged man." The Egyptians intended their taxation of the Hebrews to humiliate and discourage them. The Hebrew tongue, recognizing the cause-and-effect relationship between taxation and discouragement, expresses the concept of taxation and the concept of discouragement with one-and-the-same Hebrew root. Thus, when a Hebrew writer uses this term, he likely intends both meanings, each in their entire force. See generally app. 19 of this book (discussing the intent of Hebrew writers' use of a single term to carry two or more concepts).

[192] By the letters, "officers of revenue," Hebrew שרי מסים (*saair miseem*): viz., revenue officers or, in American English, *revenuers*.

[193] See generally *Exodus* 1:11, where Scripture records that Pharaoh used the Hebrews to build "*cities of* [ערי: *aray*] *government administration* [מסכנות: *misacanoth*, formed by prefixing the מ (*mêm*) of place to the root סכן (*soken*), meaning, "to be of use," and resulting in "useful *place*"]. The finer shades of *misacanoth* are context dependent, but the idea "useful place" runs as a thread through all the term's many uses. In *Isaiah* 22:15, the term occurs in the participle form, "marking the name of an important governmental office." 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 625.

In *Exodus* 1:11, *misacanoth* denotes "storage cities." Thus, the term is sometimes translated, "treasure city," "depository," or in a military sense, "magazine" because as storage places these cities are centers of government administration in which a ruler exhibits his wealth, through which his economic power extends, and from where he displays and commands his military force. Such were the treasure cities of Pharaoh in *Exodus* 1:11a "place for central administration of government."

[194] Seeing the opportunity that cites offered despots, early Americans knew that the growth and development of cities is dangerous. Thomas Jefferson and Daniel Webster were never shy in their disfavor of fostering cities: Jefferson spoke out for the superior personal qualities of the yeoman farmer and Webster spoke out concerning his fear of urban culture's consumptive effects, such as debilitation of personal fortitude and intrepidity. Jefferson saw the future security of the United States only as she rested for her character upon the hard work and values that arise naturally from agrarian life. In Jefferson's view, the *sturdy yeoman* must form the moral, economic, and political backbone of America; on that point Jefferson' prediction was correct.

government wealth, power, and the bureaucrats required to hoard and organize these,[195] multiplying potential for despotic control.[196]

§ 2.5
Roman Agricultural Order

The founding families of Rome owned and resided on small family farms[197] near present-day Rome. Their gathering place to trade and, in case of threat, to muster for safety and military defense became the city of Rome. Over time, as the Roman imperial government swelled over more and more territory and people, as Roman ploughs broke more ground, as wealthy Romans controlled more and more land, and as the slave trade grew, Romans developed large farms called *latifunda*.[198] Most

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Daniel Webster carried the same view, but did so in the face of the industrial revolution, merely incipient in Jefferson's younger days and still undeveloped in his final years. By Webster's time, however, American industry had moved into full swing; as the industrial workforce concentrated population in developing cities, he saw the result; what he saw discouraged him. Consequently, Webster advocated ideals calculated to discourage concentrations of population in cities, to disperse immigrants and, thereby, to prevent the compromise of individual rights inherent in urban-law culture.

[195] Such places of concentrated state wealth, power, and administrative bureaucrats are called *depositories* or, to use an older term, "treasuries." At one time *treasure* referred to any storage of goods or concentration of government administrators. In our day, however, *treasure* and *treasuries* has come to conjure up mental pictures of horded jewels and precious metals, but not mental pictures of storage of less-precious commodities and places of government administration. Often, however, such depositories are both.

[196] In Scripture, idolatry is the attribution of ultimate authority to the false gods (lawgivers) of the Babylonian system. *Revelation* 18:3 reveals that the fall of Babylon and the cities she has duplicated and reduplicated result from her *fornication* (*πορνεια: porneia*) with the rulers of this world, as these have submitted to Babylon's demands. Scripture equates the fall of the cities that Babylon has duplicated and reduplicated of herself with the fall of "*the* great city," viz., Babylon. Babylon symbolizes and is the mother of all false religion, which always demands despotic law and government.

[197] Small family farms, each family living on its farm and apart each from others, were also the first farming units of the Celts in England. The Anglo-Saxons, on the other hand, adopted the *champagne* farming method, keeping their homes in small villages. Moreover, because the Anglo-Saxons had organized their farming operations in villages, they dwelt in the valleys. The Celts, each family dwelling on its separate farm, built their houses on the highest spot on the property in order to keep the ground under their houses dry from the sop of collecting water and to provide a better view of their farm and any brigands. See generally §§ 3.2.3, 3.2.3.1 of this book (discussing the Anglo-Saxon farming village and land use custom).

[198] *Latifunda* compounds two Latin terms: *latus* meaning "broad" and *fundus* meaning "foundation." The English equivalent is "estate" or "villa"; sometimes these are interchangeable terms, villa referring to a smaller tract. The Spanish settlers carried this Roman institution to the Americas. In naming it, they coined what is now an Americanism constructed from the Spanish: *hacienda*. By whatever name used, the economy of the latifunda had developed around slavery in fact.

of these estates were 1000 acres or more with slaves tending them. Rome expanded her institution of slavery through two methods: she accorded to provincial governors total power within their provinces to enslave whomever they pleased of the populace under their power; she encouraged slavers to adventure beyond Rome's frontiers and into the unconquered territories to harvest slaves.

During the early centuries following Rome's founding, the Romans never organized *latifunda* because they owned no slaves. However, as Rome gained power and dominions, and the wealth flowing there from, slavery became popular, especially in the empire's milder Mediterranean regions, where wealthy Romans organized their *latifunda* around the institution of slavery. Then, after collapse of the Western Roman Empire in A.D. 476, wealthy Romans also established farms in the well-watered northern areas of the former empire. In these colder climates, however, the Romans never used slaves because an idle slave was unprofitable to maintain over the winter months. In addition, because land-holding Romans desired to stay in Rome, where political influence was available, these farm owners became absentee land holders, letting out their northern land to tenant farmers, much as occurs nowadays in the American Midwest.

The hacienda of the American Southwest, coupled with priestcraft and Rome's mission system, was a central cultural institution in the American southwest—from Texas and west through what is now New Mexico and Arizona to California, thence northward along the Pacific coast. In purpose, the hacienda was to the warmer regions of the American Southwest, what the Jesuit missions were to the colder regions of French Canada: in both cases the priesthood used their craft to dominant and exploit the Indian tribes. According to the testimony of Jedidiah Smith—the first American to cross overland from Santa Fe into Southern California (1826)—the Spanish mission at San Bernardino used this institution.

In 1827, Smith again crossed the same desert ground from the east. This trip, however, Indians killed half of his party and stole their horses near the Colorado River. Smith and his party, still pressing west, encountered Indians enslaved by the mission and tending cattle in the high pass region between the San Gorgonio and San Jacinto mountains near present-day Banning, California. Upon reaching Los Angeles Pueblo—now the city of Los Angeles—the Mexican governor hospitably received Smith and his party, dined them, gained their confidence, and then jailed them as American spies. At this hostile act and thereafter, Captain Smith took a dim view of his hosts.

Smith was a devout Methodist from Illinois with childhood roots in New England. He recorded his view of the Spaniards, their law and government, and their culture from his Protestant view of the world. Upon crossing into California in 1827, Smith and his party had journeyed down from the Great Salt Lake before turning east. Just before this, Smith had become the first white man to travel eastward from California to the Great Salt Lake. See generally F.N. Fletcher, *Eastbound Route of Jedidiah S. Smith*, 1827, CAL. HIST. SOC'Y. Q. II. 344–49 [n.d.], for background of Captain Smith's party's 1827 journey into California, i.e., Smith's prior route of 1827 from California into Utah, *cited in* KIT CARSON, KIT CARSON'S AUTOBIOGRAPHY 90 n.78 (Milo Milton Quaife ed., photo reprint, R.R. Donnelley & Sons 1966) (1935).

§ 2.6
Emperor Worship

Throughout history, emperor worship has been done under many names. Nevertheless, in all cases, it amounts, at bottom, to the same thing: one's receiving the conscience and will of another in place of the disciplined use of one's own. God's smiting of the Babylonian settlers with the frustration of many tongues had scattered them along with their notions of emperor worship. Some of these Babylonians settled among Rome's founding families. The Etruscans then introduced academic prestige and intellectual pride to Rome's families, germinating those spores. Later, when the Medo-Persian emperors smote the Babylonian priesthood, seeking the priests' death, they fled to Pergamos and set up its headquarters there. Then in 48 B.C., Julius Cæsar brought emperor worship from Pergamos to the forefront of the Roman state, where it gestated. Finally, in 27 B.C., Julius Cæsar's nephew Octavian delivered it into full-fledged practice in Rome. From A.D. 81 to 96, Domitian ruled Rome's empire; the Romans—making unabashed exhibition of what Gerhard Friedrich of Tubingën calls the *Imperial Cult*—addressed him with the title *Our Lord and our God*.[199]

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[199] In *John* 20:28, Thomas, the disciple of Jesus Christ, used the same phrase given for Domitian's title, albeit in the first person possessive, to confess Jesus Christ's supreme divinity: *ο κυριος μου και ο θεος μου* (My LORD and my God). Domitian's title, "Our Lord and our God," and Thomas's response to Jesus, "My LORD and my God," both recognize supreme deity: "LORD" and "God," both being of the genitive case, describe the same person. The genitive case "specifies by the ascription of a rational attribute." H.E. DANA AND JULIUS R. MANTEY, A MANUAL GRAMMAR OF THE GREEK NEW TESTAMENT 75 (1927), *citing* C.B. Williams (unpublished grammar notes). See also *Mark* 1:1, where Mark, intending an initial and direct refutation of Rome's claim of their emperor's deity as son of god, opens his Gospel by introducing his subject, Jesus Christ, with another well-known Roman formula of imperial deity: *Ιησυς Χριστου υιος θεου* (Jesus Christ: Son of God).

Granville Maynard Sharp's tract of 1798 entitled *Remarks on the Uses of the Definitive Article in the Greek Text of the New Testament, Containing Many New Proofs of the Divinity of Christ, from Passages Which Are Wrongly Translated in the Common English Version*, propounded Granville Sharp's Rule Number One: "When the copulative *kai* [*και*] connects two nouns of the same case, if the article *ho* ['ο], or any of its cases, precedes the first of the said nouns or participles, and is not repeated before the second noun or participle, the latter always relates to the same person that is expressed or described by the first noun or participle . . . ." *Id.* at 2.

After two centuries of scrutiny, Granville Sharp's Rule Number One remains without exception, respecting singular Greek nouns. Concerning Rule Number One's application to plural nouns, Sharp states, "[T]here are not wanting examples, even of plural nouns, which are expressed exactly agreeable to this rule."

Emperor worship, before spreading, had originated at Babylon as *shepard-hero* worship.[200] The English word *hero* is of Babylonian origin and throughout history has carried the civil-law concept of the semi-deified emperor. It stems from the old Semitic הרעה (*hay-ra'a*): formed from the root רעה (*roe*), meaning "shepherd," and the aspirated definite article ה (*'ay*) prefix. Because the concept this term carried was basic to civil law and government, its meaning became inextricably bound into the term's fabric. Thus, the term survived centuries of use in the Semitic, the Greek, and then the Latin, arriving in English with only some fluid change in the pronunciation of the vowel sounds: beginning in ancient Semitic as *hay-roe* and centuries later coming to English as *hero*.

In the old Semitic tongues, *roe* and its cognates meant to "watch over," as does a shepherd. From the time of Sargon of Akkad (about 2300 B.C.), anarthrous cognates in ancient Akkadian (*re'u*), and Ugaritic (*r'i*), occur in royal inscriptions as a title of honor. "Cognates are also found in Aramaic, Phoenician, and other Semitic languages,"[201] including Persian.

Roe and its cognates, as found borrowed by European tongues and prefixed with the definite article *hay*, is of greatest significance, denoting *the* shepherd, viz., *the overseer*: set apart from all others by positioning himself on an elevated place, enabling ready view of his entire flock at a sweeping glance. The Latin took its term *heros* (masculine singular) from the Greek *'ηρως* (*hayros*): the rough aspirant over the *η*– being from the old Semitic definite article, again, meaning *the* shepard. Moreover, translators often render the Greek *hayros* with "demigod," meaning, by the letters, half-god; rightly so, because the gods of the Greek pantheon were crosses between deity and a human, making their gods half one and half the other.

Political rulers claiming semi-deification[202] were called both by the ancient articular title of dignity, *he-row*, and the less-than-dignified "demigod," i.e., the practitioner of *demagoguery*: the evil art of leading (*αγογος: agogos*), as does a Shepard, masses of the people (*δεμος: demos*) astray by impassioned words of delusion.[203] Evidence also suggests that

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[200] See generally § 2.1.1 of this book (discussing Nimrod's rise to power by promoting himself as a kind of protector shepard-hero).

[201] 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 852, *citing* Thomson, *The Shepard Ruler Concept in the Old Testament and its Application in the New Testament*, Scottish J. Theol. 8:406–18 (n.d.).

[202] See generally § 2.1.2 of this book (discussing Scripture's and the ancient world's references to half-demon, half-human gods an lawgivers).

[203] Such *heroes* (demagogues) are weak counterfeits of the one and only true Shepherd Jesus Christ: in no way half of any thing, but every way "very God of very God [fully God] and very man of very man [fully man]." In language refuting the false pretences of deification and hero worship of false shepherds, the true Shepherd declared: "I, I AM THE

the root *roe* is a cognate of the Sanskrit *raj*, from which stems—by an appended adjectival suffix—the Latin *rex* (king), the French *roy* (king), and the English *regal*. Any penchant for "hero" (*the* shepard) worship among the ancient Anglo-Saxon tribes died out with their receiving of the Scriptures.[204]

Shepard-hero worship has remained a worldwide practice among pagans,[205] having descended to all cultures through the early Babylonian hero-worship cult of Nimrod. In the ancient world, emperor worship had reared its ugly head first at Babylon, then in Egypt, and among the early Greeks in Pergamos. The Canaanites rendered their worship to the total state in the person of the emperor, calling it *molech*[206] worship. This notion has scattered to all continents; the trappings attending its doctrines worldwide evince an amazing consistency in form and practice—all being wholly antagonistic to the laws of nature, the common senses, and the Word of God written. The shepard-hero notion later arose among Europe's monarchs, under the name "divine right of kings."

§ 2.6.1
Molech Worship

The Hebrews called the god of the Canaanites *Molech*:[207] a ply on words formed by combining the consonants from *meleck*[208] (the Hebrew term

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Good Shepherd; THE Shepherd, the Good lays down his life [*ψυχην* (*tsuekane*): physical life] for sake of [*'υπερ* (*who-pear*), with the genitive] the sheep." *John* 10:11. God initiates His relationship with man by first laying down His life for man. By contrast, civil-law systems command that men first lay down *their* lives for the state incarnate: a half-deified demagogue, whether called president, king or queen, emperor or empress, a legislature, or the popular majority.

Human history has seen a good many false shepards, making empty claims—*e.g.*, Mohammed claimed to speak the truth and Budda claimed to be sincere in his search for the truth—, but only Jesus Christ claimed to be the Truth and then made good on His claim. Christ warns his readers to beware of wolves in sheep's clothing. His warning refers not to wolves disguised as sheep, but rather to wolves dressed in the garb of a shepard. *See Matthew* 7:15. Since the days of Babylon, the mantel of priestcraft meant to signify divine power, has been the cowl of sheepskin or *pallium*.

[204] *See* BERMAN, *supra* note 9, at 64.

[205] An immigrant from Venezuela recently told the writer that many people there take part in worship of the dictator, accepting his claim of total right to all power.

[206] See generally § 2.6.1 of this book (discussing Canaanitish molech worship the Old Testament as a civil-law concept of the total state).

[207] Hebrew: מוֹלֶךְ.

[208] Hebrew: מֶלֶךְ. Translated *king*, this term denotes one holding limited authority: the delegation to act concerning certain matters only. Hebrew kings had limited authority. At times, their authority was small and at other times great; but in every case, they derived authority from God and it was, therefore, subject to His limits. Further, God limited Hebrew kingship by three principles: first, kings remained responsible to God, the Author

for "king") with the vowels from *bosheth*[209] (the Hebrew term for "shame"), resulting in *Molech*—"king of shame."[210] Augustine equates the worship of Molech to worship of Saturn, recording that the Carthaginians sacrificed their children to Molech under the name Saturn. Sometimes also called *Chemosh* or *Milcom*, these three are but different names for the same false god of Babylon.[211] Baal worship is also a form of Molech worship.[212]

Though historians find room for speculation and disagreement about the details of Molech worship, certain matters concerning it are clear: *Molech* signifies an earthly ruler decreed an heavenly deity, and an heavenly deity crowned as an earthly ruler. To the ancient pagan, Molech was the divine-human link between heaven and earth, but to the early Christian, Molech was a counterfeit of the true Christ: fully the Son of God and creator of heaven and earth; fully man and ruling in heaven and on earth. Under Molech worship, the authenticating mark of a human ruler's divinity—his immediate descent as son of a god—was the ruler's exercise, through the political order, of great power on earth. In a word, the ruler having shown his ability to use power to enforce his will shows his divinity, or semi-divinity, and his right to receive the worship and loyalty of others.

Further, such tyrants use their *seizure of power* to justify their divine *authority*; the grabbing of power—or so such men believed—proves the right to use it.[213] Molech worship was, and remains in its many forms, the ultimate political religion: worship of (full submission to) the total state. The human king, as Molech, identified with deity to the degree that that king manifested power. Thus, Molech worship was worship of the state

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of their authority; second, because God granted kings' authority, He had the right to take it away; and third, God never dispensed all of His authority to any single king. See generally app. 15 of this book (further defining and discussing *meleck*, the Semitic concept of *jurisdiction* or authority in the Old Testament and as the words of Christ carry it over to the New Testament).

[209] Hebrew: בּוּשָׁה.

[210] *See* 1 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 509. The Old Testament often uses such plays on words; though appearing often, however, plays on words as a literary device do not dominate the Hebrew Old Testament.

[211] *See* WILLIAM SMITH, SMITH'S BIBLE DICTIONARY 418–19 (1967). *See generally* 1 *Kings* 11:17, *Jeremiah* 32:33 (Molech as *Milcom*); *Zephaniah* 1:5 (Molech as *Malcom*).

[212] *See Jeremiah* 32:35.

[213] By contrast, common law requires proof of authority to authenticate use of power: before power is given, a candidate must prove his trustworthiness. The common-law writ quo warranto summons the exerciser of state power before the court and asks "by what authority?" he exercises power. If the summonsed one fails to prove requisite authority to the court's satisfaction, it will enjoin his unauthorized exercise of power.

embodied or incarnated in a man or a combination of men acting with a single will and claiming total jurisdiction over all aspects of every person—body, soul, and spirit—by political, economic, and spiritual manipulation. Thus, Molech worship is a fictional incarnation of deity. Where the state claims total jurisdiction over the affairs of humanity—as does the modern state in practice, if not in creed, answering to none but itself—, it claims unlimited jurisdiction of its law and government.

Molech worship is an Old Testament designation of the civil law's semi-deified chief-of-state claiming the divine right to state power. The notion has carried into the modern world:

> The modern word for such a government is totalitarian: a government that arrogates to itself total power. The crowning goal of Satan is to have a totalitarian world government. We who have known something of God the Creator know that total power can reside only in Him. Clearly the maker of anything is greater than anything he might make. The very possibility of a Frankenstein monster, the creation of human hands that can destroy humans and not be destroyed by them, is a false image of distorted reason. It presupposes a supernatural evil genius, which deceives men into thinking they have made something while really they have been but passive agents of an unknown power. The potter can do what he will with his clay.
>
> It is certain that the ultimate in supremacy, the greatest power there is, is the power to give existence to everything that is. God alone owes His own being to no other and has eternal existence in Himself. The mere possibility of total power residing anywhere forces us to recognize it in the Creator. Total power can be seated nowhere else. Any person who refuses to acknowledge that all things were made (and hence there is a Maker) simply rules out any consideration of the fact that total power exists anywhere. Thus we may say that for both Christians and non-Christians there is no reasonable way to establish total power anywhere but in the Creator of all things. Apart from Him, all power is divided and thereby limited.[214]

[214] T. ROBERT INGRAM, THE WORLD UNDER GOD'S LAW 24 (1962).

Thus, Molech worship was the Babylonian system played out to its conclusions; that Molech was a *pontifex maximus*, is a view "stoutly maintained . . . by a large number of scholars."[215] William Foxwell Albright, initial authenticator of the Dead Sea Scrolls, holds that the Old Testament's references to the sacrifices of *molech* were not strictly to a god called *Molech*; but rather, *molech* was the noun denoting the sacrifice of one's firstborn to the state, incorporated in the person of the deified earthly king.[216]

When *molech* appears in the literary form *malcham*,[217] says Robert Young, it denotes veneration of reasoning or thinking, i.e., worship of the human mind as the measure of all things or *humanism*. Thus, when an Old Testament writer refers to Molech worship with the term *malcham*, he highlights the inevitable elevation of human reason above the revelation of God that results when a nation attributes god-like powers to earthly rulers. Civil law and government rest upon these shifting sands of human reason.

In Moses' telling of God's defeat of the pagan kings, Scripture refers to their holding of human reason as the measure of all things, in less-than-commendable terms.[218] For example, Moses speaks of *Sihon*[219] ("dirt" or *off scouring*) the king of the Amorites, who dwelt in *Heshbon*[220] ("reasoning") and Og King of *Bashan*[221] ("shame"). Thus, Scripture connects *Molech* to godless human reasoning and shame. It is the fundamental premise of Roman civil law that its Code is the supreme revelation of perfected human reason, whereby man is to measure, define, and allow or deny human relationships. Molech worship is an ancient designation for the principles of civil-law government.

Rome did not originate emperor worship, but it reached a notorious practice there that remains in the world's memory and that political leaders have sought to copy.

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[215] 1 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 509. *See generally* A. BENTZEN, KING AND MESSIAH 1955; 1 ENGNELL, STUDIES IN DIVINE KINGSHIP IN THE ANCIENT NEAR EAST 1943; MYTH AND RITUAL (S.H. Hooke ed., 1933); (supporting Culver's statement, although Culver rejects this view).

[216] See generally WILLIAM FOXWELL ALBRIGHT, YAHWEH AND THE GODS OF CANAAN (1968), for a comparison and contrast of the Canaanite's Molech worship with the Hebrew's worship of the God of Israel.

[217] Hebrew: מלכם.

[218] *See Deuteronomy* 1:4.

[219] Hebrew: סיחן.

[220] Hebrew: חשבון.

[221] Hebrew: בשן.

§ 2.6.2
Julius Cæsar & Emperor Worship

[W]e see the visible rulers claiming to be the representatives of God, the common good, the material forces of history, the general will (either through vote or intuition) tradition, or other intellectual "spooks" that serve to lessen the envy of the ruled for the rulers . . . The Roman Empire was unquestioned by the mass of its subjects for centuries, but the Emperors lived in constant fear of coup and assassination.[222]

Julius Cæsar conquered France and Italy; then, in 48 B.C., Rome voted him dictator. Cæsar's assassination, four years later, resulted from his failure to eliminate those disloyal to him. Those wealthy men who had invested in him had gotten from him the riches they had bargained for and no longer needed him. Failing to use his imperial power against his internal enemies, Cæsar's dictatorship was cut short: Roman senators murdered him on the fifteenth day (ides) of March 44 B.C. Upon Cæsar's assassination, civil war broke out and lasted until 27 B.C., when Julius Cæsar's nephew Octavian took power. Thereafter, a series of emperors ruled the Roman Empire, keeping their dictatorships by controlling Rome's army (legions) and never hesitating to use this instrument of raw power to enforce their will. History considers Octavian the first true Roman emperor because he fully acted upon the imperial prerogatives that the emperor of Pergamos, Attalus III, had bequeathed to the Roman emperor and that Cæsar had established in law.[223]

Rome never developed any hereditary system of emperorship; historians have yet to agree on the reason. Taken together, the Roman emperors fathered few legitimate children. Though unlikely, some say that lead poisoning—contracted from the lead piping used to plumb the homes of affluent Romans and from their pewter-ware—made Roman leaders impotent. Other explanations are clearer. For example, some emperors were childless because they refused to take a wife into marital intimacy, choosing instead to practice sodomy. In any event, history records that Roman dictators seldom had families, just as some

[222] THE OCCULT TECHNOLOGY OF POWER 14 (1974) (n.a.).

[223] The Latin *imperator* signifies one who decrees with imperatives in the sense of commands; the term means "commander-in-chief." The command of the emperor over Rome's army or legions insured the foundation of his office: the power to enforce his will. Such raw political power is the basis of civil-law government, whether called communism, monarchy, socialist republic, or democracy; such rule is by inducement of fear of state power. Political labels, such as the foregoing, however, never provide government with its essence and character; rather, governments often design political labels in order to hide their essential motives and dominant characteristics.

politicians and other public figures of recent times. Wealthy but childless Romans, attempting to pass on their families wealth and power—at least in name—even set up a system of adoption.

Though the emperor's office was unobtainable by inheritance, the road to power in Rome remained constant: a man became emperor only by gaining the support of Rome's legions; this method continued until A.D. 453. Once, however, a man gained imperial power and emperor status, he often lost it by assassination or through coup. To the Roman, acquisition of the ability to exert force was the divine sign of authority. Authority flowed from raw power; might made right. In practice, Rome never distinguished authority and power.

Rome allowed to Cæsar's nephew Octavian the title *Augustus*. He commanded the army (legions), had veto power over official government acts, and held a seat in the Roman senate. Because Augustus and his successors emperors commanded the legions, they held unmatchable power. In the empire's earlier days, and in spite of forms and appearances, Roman emperors operated behind the scenes, directing those in powerful positions—as does a political boss nowadays. These emperors nevertheless maintained the appearance and gave the impression that the government of Rome was republican. The perception that Rome was a republic persisted among Romans, in spite of the festering imperial cult of emperor worship.[224]

The world has never known an empire comparable to Rome's: it maintained its outward, visible existence for a thousand years. Nevertheless, because the empire was powerless to rise above the ultimate object of her worship—the state incorporated in the person of her emperor—it decayed and fell into ruin. Emperor worship continued

[224] Rome's autocratic régime ruled under the guise of republican forms. A present-day example of such political inconsistency is Mainland China, where it is unlawful to teach the deity of Christ or to speak His title—"*The* Son of God"—, yet China labors to maintain the world's perception that Christians are free to worship, each according to his conscience. To teach the supreme deity of Christ is to acknowledge an authority and power above the state—intolerable to the total Chinese state. Though China does not expressly assert the deity of her government or chief-of-state, China refuses to acknowledge any authority greater than the Chinese state. For the Chinese state's purposes, it is the people's *perception* that they have liberty of conscience and freedom to worship that is considered, not that they experience liberty and freedom.

As the saying goes in politics, perception is reality and politics is show business for the less glamorous. Therefore (say the political advisors), just as the one in show business creates the perception one pines for, so the politician must set out to create the perception he desires. Thus politicians do. The common-law tradition of government and politics, being adversarial ay heart, helps correct the unavoidable attempts of politicians to create false perceptions using political show business. In common-law countries, people count on candidates for political office to use their rights of free speech and freedom of the press to correct or otherwise destroy false perceptions created by opposing candidates.

after Constantine incorporated it into the dual Roman state—combining the imperial church and government as one state in being—and propagated the imperial prerogative with earnest, holding that Rome's semi-deified emperors ruled on earth in God's place, becoming *Deus in terries*. The civil-law doctrines, preserved in the Roman Code for propagation, became Rome's prime tool for seizing and keeping power throughout her new territories. Nevertheless, despite Rome's machinations, her emperor gods, being mere men elevated to deity through the *image*-inations of men, were too weak to sustain Rome and her empire.[225]

In 107 B.C., Rome instituted military draft throughout her empire, producing an army of non-Romans: by A.D. 400, the Roman legion's officer corps—commissioned and noncommissioned—consisted almost entirely of non-Latin-speaking Germanic tribesmen Moreover, Rome's legions constantly clashed with the Germanic tribes. Germanic domination of Rome's legions was the last in a concatenation culminating in Rome's loss of her Western Empire during the years A.D. 406–476. As Rome waged war with these tribes on her northern frontiers, the legionnaires found themselves fighting their Germanic brothers and cousins, which dampened their passion to fight and to maintain discipline. Even though draft dodging and desertion were punishable by death,[226] punishment seldom occurred. According to

[225] Neither individuals nor nations will raise above that which they worship—the higher the focus of worship, the greater the potential of a nation for good doing and reaping blessing. For this reason, the Bible teaches, "Blessed is the nation [viz., people] who's God is the LORD." With Him as the only object of worship, the potential for good doing and blessing is limitless because there is no limit to God's potential. On the other hand, they that trust false gods shall become like unto those false gods. *See Psalm* 135:18. To deem something worthy of one's trust by rendering belief, obedience, time, or wealth to that thing is to worship that thing. Worship is the submission of all of one's nature to someone or some thing. *See Matthew* 22:37. Neither the Hebrew nor the Greek tongues provide a term of fair equivalence to the English *worship*. Rather the Hebrews and Greeks used many words to signify the activities of worship, all signifying acts of total submission. Total submission to the state power is false worship; total submission to divine authority and power is true worship. See app of this book (discussing Molech worship of the Old Testament: worship of the total state).

To identify one's lawgiver (the trusted final arbiter of right and wrong for one's life) is to identify one's god. According to the Second "Commandment," idols include *images* of the true God conceived in the *image*-inations of men's minds, i.e., God created in man's imagination: visualized in the mind's eye. Images (idols) are God, as man imagines Him to be. God, however, has made man according to His perfect and holy imagination: i.e., in God's image. Men are the product of God's mind, and He will not be the product of theirs.

[226] See generally § 4.7 of this book (discussing the death penalty in general and as God's Word presents it). The highest crimes under Rome's system were the military offenses of draft dodging and desertion. A nation or country attaches the death penalty to behavior that it believes strikes at its foundations and, therefore, threatens its very survival. In the civil-

Roman military law, the entire army as a group, now mostly Germanic, determined facts in trials of men charged with draft dodging and desertion. The Germanic legionnaires, however, harboring sympathy toward their offending kinsmen, seldom convicted them. Consequently, these offences became common.

Because Rome's legions failed to convict draft dodgers and deserters, discipline failed; when discipline failed, the legions failed; when the legions failed, Rome's emperor became nothing; when the emperor became nothing, Rome—having subsumed her identity in her emperor—became nothing. Rome's military might gone,[227] the Western Empire decomposed and crumbled into ashes, out of which arose the pontiff of the imperial Roman Church, holding fast to Rome's civil law.

§ 2.7
Development of Roman Government: An Overview

The Twelve Tables continued to be recognized for many centuries as the fundamental law of the Romans; they did not formally lose this character until it was taken from them by the legislation of Justinian.[228]

After the founding of the city of Rome in 753 B.C., Rome kept to herself, isolated for 357 years. Then, in 396 B.C., she conquered two nearby towns,[229] which whetted her appetite for further conquests. Rome's early conquests were often more by clever subversions than by direct military might: she infiltrated a town and found a group that wanted to join Rome; then, upon applying military leverage, the town complied and

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law tradition, the empire of Rome founded its existence upon achievement of its will as expressed by the command of its emperor and enforced by the power of his legions. The empire rested for its existence upon the emperor, and the emperor rested for his existence upon his legions. Raw military power insured enforcement of the Roman state's will, and therefore, was the very foundation of Rome's existence; therefore, draft dodging and desertion brought execution.

[227] Her legions gone, the Roman pontiffs turned to mercenary recruitment campaigns to maintain the civil law's reach and the power of wealth it attributed back to Rome. Rome's mercenary recruitment campaigns among the Swiss and the meaningless carnage of young Swiss men for the sake of Rome and at the expense of their families, gave opportunity to Ulrich Zwingli to move forward Swiss patriotism and nationalism, which enabled the Reformation there. See generally § 3.10.6 of this book (discussing evils of mercenary practice, the Hessian mercenaries' unfortunate experience in the War of American Independence, and providing admonitions applicable in our times).

[228] *See* JAMES HADLEY, INTRODUCTION TO ROMAN LAW 74–75 (1881), *quoted in* BLACK'S LAW DICTIONARY 1522 (7th ed. 1999).

[229] By the time of her first conquest in 396 B.C., Rome had developed a sophisticated, urbane system of *municipal* law as opposed to an agricultural, land-based law.

joined. With each conquest, Rome enlarged her access to men, materials, and power; in time, Rome controlled the entire perimeter of the Mediterranean Sea. By A.D. 180, 576 years after her first conquest, the arm of Rome had extended full length and the power of Rome had reached its pinnacle. Her empire now on three continents and embracing hundreds of tribes and nations, the city of Rome still administered her entire empire from Rome, through provincial cities and governors, using the civil law of Rome. She never developed a representative form of government. Rome was never a country, but always a city whose emperor imposed his will upon the civilized[230] world by imperial command.

When Rome's conquest of a new town or territory was complete, she dispatched a *pro consul* to serve as governor of those conquered. In the spirit of the civil law, Rome's provincial governors ruled with unlimited power. Each governor took from the people under his domination whatever he coveted, without restraint, making slaves of those he desired, and taking other's land at will. When an ex-governor returned to Rome from his governorship, he brought his slaves to work his Roman estate or latifunda in chain gangs. Though his fellow Roman residents also owned estates, they were powerless to compete with his cheap slave labor. His opportunity as governor to have enslaved as many persons as he desired created an unfair economic advantage over his fellow Roman citizens, allowing him to overpower and destroy them financially.

This system continued its putrid growth. To be an ex-governor was to gain the advantage of slaves; to gain slaves was to gain the advantage over one's fellow Romans; to gain the advantage over one's fellow Romans was to get their land and the production thereof. Thus, unprincipled men—of which no shortage has history yet seen—vied and jockeyed for provincial governorships. In time, only ex-governors had money to lend and their now-insolvent fellow Romans, hoping to remedy their deplorable economic condition, mortgaged their land to ex-governors. Dealing with a moneylender, however, is to play a dealer's game: the borrowers remained unable to compete with the returning governors' slave labor; erelong, the money lending ex-governors owned the borrowers' land. At one time, these debtors had been their lenders' peers, but because wealthy men, such as the ex-governors, increasingly used slaves and infused them into the Roman work force to do all labor—

[230] To the Romans, the terms *civilization, civilized*, and *civilize* meant loyalty to the city of Rome, expressed by subservience to her law: "lit. etym. sense, 'to make citified.'" WEBSTER'S NEW WORLD DICTIONARY 261 (2d ed. 1976). In the Roman tradition, *civilization* is *urbanization*; to *civilize* a people is to citify them.

skilled and unskilled, by purchase or by lease, from medical doctors[231] to street sweepers—, these debtors became paupers unable to find a job, even at menial labor. In short, wealthy slave owners (lenders) increased their holdings at the expense of their fellow Romans' (borrowers); the borrowers became slaves to the lender.[232]

Politically ambitious men—sometimes with personal wealth, sometimes with borrowed money or investors' money—often succeeded in buying enough votes to secure a job as consul. Such aspiring politicians often began wealthy, but by the time they had purchased enough votes to become consul, they were poor. When America won her independence, many in Europe doubted her survival as a representative government of indirect popular vote; never before had a country even tried to maintain the integrity of multiple polling places over a geographic area as vast as the early United States. The Roman Empire was geographically vaster, by far, than the thirteen original Colonies, but, nevertheless, offered only one polling place: the city of Rome, with only blue-blooded Roman citizens holding the power to vote.

Many such financially ruined fellows had descended from the landholding founding families under Romulus, first king of Rome. In addition, they held the only strictly hereditary political right in the Roman Empire: the right of a Roman citizen to vote. The only thing of

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[231] Luke the evangelist, writer of the third Gospel, was a trained physician and likely a slave, although no conclusive evidence has surfaced. That Luke was well-educated is seen by comparing Luke's writing style and vocabulary with the other New Testament authors: his attention to detail is deft, he provides the only example of classical Greek in the New Testament (found in the opening four verses of his Gospel), and his accurate use of Greek medical terms is telling.

[232] *See Proverbs* 22:7. In some vicinages of Greek and Roman society, up to one half of the population owned the other half. According to some, this damaging state of affairs in Roman society (a repeat of Greek culture) was the thing that moved Abraham Lincoln to declare, "This nation [the United States] shall not survive half slave and half free."

Billy Herndon, Abraham Lincoln's law partner in Springfield, Illinois, said that when Lincoln and he rode the vast prairies of Illinois's eighth judicial circuit, at day's end, the two often checked into an outpost inn dog-tired; to reduce costs, they shared a room. Once, in the dead of night, Lincoln's high-pitched voice awoke Herndon. In the darkness, he made out the silhouette of Lincoln's long frame sitting bolt upright in bed, Lincoln repeating to himself, "This nation cannot survive half slave and half free."

Greek writers made similar statements concerning segments of Greek society, such as of the Isle of Crete. Lincoln had likely found in his reading of the ancient Greeks that slaves were as plentiful in Greek and Roman culture as free citizens. This, according to some, was a chief reason for Rome's decline and fall; likewise, Lincoln believed that slavery was contributing to the decline of the United States. In private letter, however, Lincoln historian and presenter, B.F. McClerren, has informed the writer that Billy Herndon's story of hearing Abraham Lincoln speak of our nation's survival in the dark of night "is not verified." With minor variations, Lincoln's contemporary, Judge T. Lyle Dickey, related a similar story concerning Lincoln.

value any one of these broken men had left was his vote in the assembly as a free Roman citizen; this vote he was willing to sell. The idea that man's Creator had endowed him with *in*alienable rights was absent from Rome's civil law. Thus, the Roman's right to vote was not only alienable, but also negotiable: Romans began selling their rights to vote at handsome prices. In time, traffic in votes was pervasive and the outcome destructive. Negotiable votes were key to Rome's decline and fall. A majority of votes meant control Rome's legions and thus of the state. Thus, by purchasing and amassing other Roman citizens' votes, the purchaser gained the military power to enforce his political will.

The pursuit of power by this practice became a popular mania. Thus, Julius Cæsar, by buying the rights to vote, came to power. Not already wealthy, however, he had borrowed the equivalent of over four-million dollars from financial backers and then used it to buy enough votes to become consul. He then gained command of an army and a province, conquered Gaul (modern France), paid off his financial backers, and became rich.[233]

§ 2.7.1
Pontifex Maximus, Patrician & Consul

Before Rome's founding and in her early days, each family inhabiting the area surrounding Capitoline Hill had its own family priest called *pontifex maximus*, stemming from the councils of ancient Babylon.[234] The early Roman kings also held the office of chief *pontifex maximus*. As the ancient kings of Babylon had done, the early Roman kings passed their priestly office to a chief *pontifex maximus* of the city of Rome tenured for life, as the office still is to this day.[235]

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[233] Though Julius Cæsar was attentive to official duty, his sub-governors often neglected the public welfare. Pontius Pilate, the well-known inquisitor of Jesus Christ, was such a Roman sub-governor under the Roman emperor. *See Matthew* 27:11–25, *Mark* 15:2–5, *Luke* 23:1–7, *John* 18:29–38.

[234] See generally § 3.8.1 of this book (discussing the divine-right-of-kings theory as a later expression of the office called *pontifex maximus*, John the apostle's reference to this concept, and the common-law tradition's aversion to it).

[235] The Roman chief priest's office (*pontifix maximus*) has continued in fundamentally the same function—and even the same trappings—to the present day. Over the centuries, however, it has expanded its reach. At the founding of Rome, almost 2760 years ago, *pontifex maximus* was the title of the family priest, which, in most cases, was the patriarch. Romans later transferred this title to the chief priest of the city of Rome. Then this city office came to encompass the Roman Empire and all persons in it. Following that, in 133 B.C., the King of Pergamos, successfully claiming the supreme priesthood (supreme *pontifex maximus*) of all Babylonian worship, transferred his prerogatives to Julius Cæsar, the Roman emperor, by testamentary deed of his kingdom and his Babylonian priest title of

From 510 B.C. to 451 B.C., two *patricians* called *consuls* governed Rome. These functioned as did the former Roman kings, but reigned together. The patrician-consuls, busy with administration and military affairs, tended to refer legal questions to Rome's *pontifex maximus* (chief priest), for his counsel and advice. During this period, the *plebeians* (*non*-descendants of the approximately 300 founding families)[236] swelled to half of the population, and demanded equal standing as Roman citizens. They first gained the right to elect "Tribunes of the Plebes": officers empowered to protect plebeians against patrician oppression. By further pressure, the plebeians gained permission to elect ten men empowered to make and publish a codification of Rome's laws, no longer to be secret: i.e., confined to priests of the Babylonian religious cults. As a result, in 451 B.C., the assembly[237] ratified the XII *Tables of Roman Law*.[238] Rome then carved these laws on stone tablets and set them in the Forum, the place of public viewing, for all to read.

The XII Tables' chief provision stated that whatever the majority vote of the people ordained in the last instance is the law; by this provision, the people[239] deemed their simple majority to be sovereign: the voice

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priesthood: *pontifix maximus*. See generally § 2.3 of this book (for background concerning Attalus III's testamentary devise of Pergamos and its prerogatives of priestcraft-statecraft to Rome). Since the twelfth-century decree of pope Gregory VII, Gregory, as *pontifex maximus*, also declared his imperial office to be over all peoples of the earth. Therefore, he holds himself forth as priest (supreme pontiff) and king over all. When he speaks *ex cathedra* (from the throne), he also holds himself forth as prophet, speaking without error, whether concerning truth's application to present or future circumstances.

[236] *See* ADOLF BERGER, 43 pt. 2 ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 411, 620–21 (1953). Rome's entire body politic was hereditary. The office of emperor, however, was not.

[237] Latin: *Comitia centuriata*.

[238] Known to Romans as *Lex Duodicem Tabulae* and written on twelve tablets during the fifth century B.C., the XII Tables remained in force as the fundamental law of the Roman Empire until Justinian's Code replaced the Tables over 1000 years later.

[239] When one refers to *the people* within the context of democracy's majority, one does not mean all the people, but, rather, more than 50% of the people. Democracy is not truly rule by the *demos* (Greek *δεμος*) or people; rather, it is rule by a faction of the people contrary to the remainder of the people. Democracy, therefore, is not the will of the people, but always denies the will of some of the people and often denies the will of almost half the people. The Bible never approves naked democracy; nor does history demonstrate that democracy produces liberty. See generally §§ 5.3.5–5.3.5.2 of this book (discussing the concept *democracy* and the danger of majority rule unlimited by law).

When Noah and his family boarded the Ark, God approved their minority convictions, certifying His approval by making them the majority upon un-boarding the Ark. The common-law tradition recognizes in the minority an indispensable responsibility to obey a higher standard and to teach its precepts. It is the Christian's duty to do as Ezra by aligning his thinking with God's (i.e., biblical thought patterns, a biblical worldview) and then "to do and to teach" others. Scripture attributes Ezra's intrepidity to his submission of his mind and intellect to God: he allowed the LORD to "*prepare* his desire [Hebrew לב (*leb*): *heart* in the sense of affection and volition] to *search out* the LORD's law, then to *do*, then to *teach* in Israel, statutes, and judgments [the law's particular application according to case

from which no appeal was allowed. The Roman people, therefore, replaced their Babylonian gods with a majority of their number. Moreover, since the majority's voice was equivalent to supreme deity, the majority faction became, in effect, Rome's god, able to get its cravings without fear of the minority's appeal to any higher power. Any who were willing, the majority allowed to join their number and enjoy the spoils of the majority's goals: state favor and government largess through plunder of the minority. In time, the leaven of majority rule, unlimited by law and individual rights, played itself out in inevitable anarchy and confusion, moving the now bewildered and anxious Romans to pine for and receive an all-powerful *imperator* to commandeer them and bring stability, albeit only if temporary.[240]

Erstwhile, however, the majority of Rome's people now being Rome's ultimate arbiter of right and wrong, the Romans believed they had enabled themselves to change the law by simply changing its expression. Thus, two years after the enactment of the XII Tables (453 B.C.), the

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precedent]." *Ezra* 7:10. The Hebrew grammar of this verse demands that the action of its three verbs occur consecutively in time: *then* (ו: *wow* consecutive) is a term of timing and consecution. Peter the apostle further defines what it means to receive preparation of one's desire to seek God's law in His Word written. *See* 1 *Peter* 2:1–2.

[240] If majority rule (inaccurately called *democracy*) leads to disintegration, how is it that Rome's empire held its integration for such a long period? Straight away, the reader will observe that Rome's so-called democracy did disintegrate and dictators were welcomed in an effort to regain unity. But beyond that, the reason for Rome's continued unity and earthly success lies in God's observation concerning the builders of Babylon's tower:

> And the LORD [יהוה (*Yaweh*)] said, Behold, the people are unified, with one language for them all, and they have begun to make this thing, and now nothing which they purpose to do will be impossible for them.

Genesis 11:4 (emphasis added).

In this verse, Scripture uses *Yaweh*, God's covenant name, to denote "He that completes [His undertakings]" because in this narrative, God is about to foil a violation of His covenant promises concerning *mankind* (אדם: '*adam*). The Roman Empire fulfilled the two requisites of *Genesis* 11:4 for temporal success even though Rome's purposes were—as were the Babylonian settlers—contrary to God's.

First, as were the Babylonian settlers, the Romans were of *one unified purpose*, i.e., to build their empire. *Second*, as the Babylonian setters held a common tongue, the Romans shared a common language, *Koiné* Greek, which had developed as the *universal language* in their empire. Even as this Greek language began to fade away in the West, Latin replaced it. Significantly, however, the dividing of the Roman Empire between East and West was simultaneous with the rise of Latin in the West. Rome divided along linguistic lines into linguistic factions, forming two cultures of common tradition, but of different tongues, which remain in the present: East and West, Greek and Latin. *Third*, as had the Babylonian settlers with their city and tower, the Romans had *begun to work* at building their empire in earnest—the Romans' motto was *labor omnia vincit*: "labor conquers all." Therefore, the Romans' potential for completing their ambition was great. See generally app. 3 of this book (discussing אחד: '*echathd*, the Hebrew concept of unity as set forth in *Deuteronomy* 6:4).

majority enacted a rule permitting the assembly to enact future laws by political wards, in which patricians and plebeians functioned on equal terms, instead of in the old assembly of *curies* from which Romans excluded plebeians. Even so, the majority forbade this new assembly to initiate legislation, allowing it to only adopt proposals introduced by the presiding consul, without amendment or debate. This method of enacting legislation continued until the reign of Julius Cæsar. During this entire four-hundred year period, however, the assembly enacted only about forty statutes affecting private law (the law of private relationships).

The reader will recall that under the early Roman monarchy, the king decided disputes between families after consulting the gods, the secret sacred books, and his fellow priests. In the same way, in the Roman government's early years before the emperors, the consuls decided disputes after consulting the same three sources, but with one exception. In cases of a crime punishable by death or imprisonment, a statute enacted in 509 B.C. gave Roman citizens the option of avoiding the consul's judgment by demanding judgment by the assembly.

Enactment of the XII Tables made two important changes affecting the consuls' judicial office: it made the written law public;[241] it expanded the judicial function to encompass disputes between individuals, no longer limiting the courts' power to disputes between families. As family life crumbled under the sensuous onslaught of public idolatry, plaintiffs and the courts increasingly ignored the non-delegable duties of family

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[241] Some say that upon becoming public, the law of the Romans became *secular* because they had separated it from religion: i.e., out from the secrecy of the Babylonian mystery religion's priesthood and into full view. To hold so, however, applies the term "secular" in a manner that drains it of its meaning. Etymologically, "secular" means "bound by time," as opposed to existing outside of time—as in eternity. Further, it is impossible to remove law from the realm of religion because religion is simply one's commitment and obedience to whatever one's ultimate arbiter of right and wrong deems right, which is, namely, law.

Secular distinguishes between that which is a product of this *present*, profane age and that which is a product of the *eternal* Kingdom of God. Therefore, all Christ-less points of view—whether considered secret or public religion—are secular. Removing Rome's law from the hidden religious realm of priestcraft and making it a public affair never made Rome's government and legal system secular or less-religious. Whether the priests kept it hidden or displayed it, Roman religion remained a product of this world or present age, completely bound in time: it has always been secular because it is of this world.

By contrast, Christianity is not secular because God never confines Christianity and its standards to this present age. It is neither a product of this world nor does this world bind it in time; even though it is "in" this world, it transcends it. Christ said, "My *kingdom* [jurisdiction: right to act] is not *of* [ablative of source: "from"] this world [κοσμος (*cosmos*): this present age and order of politics and economics]." *John* 18:36. Any power having roots in this world draws strength from this world's time-bound or secular order. By contrast, all authority (βασιλεια, *basileia*: in the New Testament, oft times translated "kingdom") in heaven and on earth has roots in its source, the eternal Godhead and is, therefore, a sacred extension reaching from the eternal into this time-bound world order.

relationships and rights enjoyed through those duties, accelerating the fragmenting of Rome's families, further weakening the empire.[242]

Nevertheless, the old hereditary Roman assembly kept their power and determined to bar plebeians from partaking in the political process. For a time, the assembly managed to exclude plebeians by restricting membership to elected consuls from among patricians nominated by the consuls of the preceding year, after they had consulted the gods. Because consultation with the gods was only through the mediation of the priesthood, the assembly's exclusion of plebeians from Rome's municipal religion blocked plebeians from *counseling* with Rome's gods concerning affairs of state; plebeians, therefore, were kept from fulfilling the personal and religious qualifications for the office of *consul*.

In spite of these political handicaps, some seventy-five years after the enactment of the XII Tables, the plebeians secured eligibility for election to the offices of consul and *censor*, the latter of which controlled admission to membership in the senate.

§ 2.7.2
Praetor, Judex & Jurisconsult

In 367 B.C., Rome created the office *praetor urbanus*[243]—often called *praetor*—and gave it the power of judicial gatekeeper over civil matters concerning citizens of the city of Rome. Plaintiffs, therefore, brought legal complaints before the praetor urbanus and he decided which complaints shall go to judgment and which shall not.[244] If he adjudged

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[242] The family is the most efficient health, education, and welfare institution ever designed. Government bureaucracies, programs, and combinations thereof will never fill the void left by family disintegration. Family unity forms the only building blocks solid enough to hold a country together. Moreover, Christ is the person holding all things together: all that "stands created" (*εκτισθη: ektisthay*, perfect passive), including the family. Further, Christ causes all things to cohere (*συνεστεικεν: soonesteiken*). Lightfoot concludes, "[Christ] is the principle of cohesion in the universe"—from families to atomic particles. *See Colossians* 1:16–17.

[243] *Prae–itor* means "the one going *before* [the people]," i.e., as a leader; the office *praetor urbanus* was "a leader of the city [of Rome]." This office held civil, but not criminal, jurisdiction over citizens of the city of Rome and no others. See generally § 3.8.4 of this book (discussing the concept of jurisdiction over persons as it relates to the benefit-of-clergy doctrine and the common law's neck verse from *Psalm* 51:1).

[244] The Roman *praetor's* function was akin to a magistrate judge in our federal courts, except federal magistrate judges are immune from liability for wrong decisions and have a wider job description, handling, at consent of the parties, pretrial motions and other threshold matters. Further, if a complaint fails to meet the requirements of due process, the federal magistrate will, on defendant's motion, "strike and dismiss" the complaint, as did the Roman's *praetor*, except with this difference: in civil-law fashion, the Roman *praetor*

that the plaintiff's complaint fell within one of a limited list of forms of action outlined by the XII Tables, he referred the case to a *judex* or judge, for determination of facts and for judgment. The law forbade the praetor urbanus, however, from referring any case for judgment unless the plaintiff alleged facts that allowed it to fall within a form of action the XII Tables permitted. On the other hand, the praetor occasionally refused to refer for judgment a case that fell within the statute's letter, but which he thought was unjust to press. The praetor's position, therefore, was powerful.

The *judex*—most often a senator and seldom a lawyer—was the presiding judge over civil cases. He determined the facts of the case from documents and the sworn testimony of witnesses—a task that the common law is willing to entrust to the Jury. Further, the judex had power to determine the law and render judgment without receiving legal advice. Evidence considered by the judex was like our own common-law-court evidence, i.e., some oral testimony and real (tangible) evidence.[245] He was liable in tort, however, for incorrect judgments; his error, therefore, was dangerous to him.

After the law ceased to be the priests' secret preserve, a class of skilled lawyers called *jurisconsults*[246] gradually emerged. Jurisconsults provided counsel and opinions to private clients. As jurisconsults' skill and reputation grew, the judex, when facing liability for his wrong judgment concerning a knotty legal question, secured the opinion of a jurisconsult and gave judgment accordingly. Enterprising parties, seeing the demand for these opinions, compiled and published them in book form, preserving them for ready use. After that, litigants sometimes cited these

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acted on his own motion; whereas the federal magistrate, being in the common-law tradition, seldom acts unless a party, by motion, presses him.

[245] In common-law courts, oral testimony controls *all* evidence in the following sense: ample oral testimony verifies all tangible evidence, enables its admission, and interprets its significance. Any tangible piece of evidence a party desires to admit into evidence is without meaning until competent oral testimony, under oath, gives it meaning. This is consonant with God's Word, stating that, in this day of man's judgment, law requires testimony of at least two witnesses—but more than three is forbidden—to establish *every* judicial fact. As does the common law, Scripture requires that competent *oral* testimony be founded upon personal and direct sensual perception: sight, sound, touch, smell, taste. *See, e.g.*, 1 *John* 1:1–3. This is why, according to God's standard, courts are never to convict an accused on his confession alone. This was also the official evidentiary requirement of the Sanhedrin, the Great Council in Jerusalem. *See generally John* 8:12–18 (providing Christ's exposition of Scripture's principles concerning testimonial evidence).

Though one's perception is direct to his senses, it remains indirect to his mind and spirit. One's senses, such as his eyes, are a medium to the perceptions and images of one's mind and spirit.

[246] The term *jurisconsult* alludes to the activity of a counselor: one whom others *consult* for an opinion in legal matters.

jurisconsults' books as authority. The published opinions of the jurisconsults were akin to case precedents: determined in retrospect, by analogy to previously decided cases, and case by case as problems arose; instead of by deduction from a provision lifted from a voluminous statutory code, as is practiced by modern civil-law tribunals.[247] Beginning with Julius Cæsar and the growth of emperor worship, however, recourse to the published opinions of jurisconsults for authority by analogy faded. Nevertheless, from the enactment of the XII Tables until the reign of Julius Cæsar, growth and development of Roman law of private relationships arose from the published opinions of the jurisconsults.[248]

During the Roman praetors' and judexs' use of jurisconsults' published opinions to justify their decisions, the Roman civil law resembled the English common law. During that time, the jurisconsults of Rome did as the common-law judges of England: they based their opinions on established customs. Unlike the English courts, however, the Roman tribunals eventually abandoned their judicial reliance on custom.[249] In addition to the assembly's legislation and the opinions of jurisconsults, *praetorian edicts* became the third source of law for Rome.

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[247] The following bears repeating: the essential differences between common-law and civil-law traditions are not in their particular laws. The standards of behavior the two require are often alike; the controlling distinctions, however, abide in their antagonistic ideals of law's source and differing methods (processes) of resolving legal disputes. The common law's method is to discern first principles—having been rendered from a gathering of appellate case opinions, each having been refined in the furnace of life's real experiences—and then to apply such principles to the dispute before the court. By contrast, the method of civil law is to reason down (deduction) from the decrees of the state as expressed in statutes and regulations of legislators or a legislating dictator.

[248] *See* DIG. 50.13.1.5 (*Digesta Iustiniani*). *Jurisconsults* enjoyed esteem among the Roman people because they never allowed others to dishonor their profession by measuring its worth by a price in money. During this time in Roman history, the civil law approached developing a fundamental likeness to the common law, but in the providence of God, it was never to be.

[249] Absence of God's Spirit limits the natural man's capacity to maintain right law and government. As amperage requires voltage to effect a useful flow of electric power, so also, human attempts at right behavior require the conviction of God's Spirit to effect a constant flow of justice. As stated earlier, God has equipped mankind, in his natural state, to perceive the proper form of administration of government and justice, but absent the righteousness of God administered by the person of the Holy Spirit as the substance with which to fill the form, in time, even the proper form will deteriorate and collapse. Tyranny then has opening to step in and fill the vacuum with the imperious breath of its will by its raw power. *See generally* CHARLES CARLETON COFFIN, SWEET LAND OF LIBERTY 54–56 (photo. reprint 1992) (1881) (providing an example from history of raw power arising among 40 men left in the wilderness to survive, with neither subjective nor objective standards). Though men put proper forms of government in place, only God can fill the forms with right substance. For example, the Constitution provides only for the guarantee of proper form for our state governments, but does not claim jurisdiction to provide its substance. *See* U.S. CONST. art. IV, § 4. So also, though the United States can provide to third-world countries the frame and form of right government by, for example, duplicating our written Constitution, the

The praetor urbanus, the reader will recall, sometimes dismissed the plaintiff's case, keeping it from going to a judex for consideration and judgment, unless it fell within one of the forms of action prescribed in the XII Tables. Moreover, even if the plaintiff's complaint did fall within one of the forms of action found in the XII Tables, but in the praetor urbanus' view will work only injustice; he had discretion to, and sometimes did, refuse to refer such a case for judgment. Consequently, the personal inclinations of a praetor urbanus in exercising such discretions became a political issue. Therefore, customarily, at election time, candidates for praetor urbanus each issued a document called *praetorian edict*, announcing policies concerning what the candidate shall require in a plaintiff's complaint before he will refer it to a judex for judgment.

Candidates for praetor urbanus stood for election each year. An incumbent ordinarily republished the previous year's praetorian edict with any minor adjustments. Because praetorian edicts were statements of policy concerning legal procedure, the Romans deemed them standards of law: legal guidance to those considering litigation by revealing how to fashion a complaint that will pass muster and allow the plaintiff in the tribunal's door.

In addition to the office of praetor urbanus, the office of foreign praetor arose. The name *praetor urbanus* denoted the magistrate (*praetor*) of the city (*urbanus*) of Rome. Thus, once the *praetor urbanus* referred a case to the judex for judgment, the civil law that he applied governed Roman citizens only:[250] i.e., citizens of the city of Rome. As Rome's territory enlarged and commerce grew, however, controversies involving foreigners—those to whom Rome's civil law was inapplicable—multiplied. Therefore, in 243 B.C., to fill this legal void, Rome created the office of *foreign praetor*.[251] As a matter of procedural form, the foreign praetor preceded much as did the praetor urbanus; as a matter of substance, however, the XII Tables and other parts of the civil law, being inapplicable to foreigners, never bound the foreign praetor's judgments.

United States cannot by surrogacy, provide the substance, which arises only out of a critical mass of religious conviction.

[250] When Roman legal writers use the Latin root *urb* or its forms, reference is to the city of Rome. *See* BERGER, *supra* note 236, at 782. Thus, the *praetor urbanus* pertained only to the city of Rome. Further, the *jus civile* was the law applicable only to the *citizens* of the city of Rome. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 57–59 (1962).

[251] Rome called the office of foreign praetor *praetor peregrinus*. The Roman Empire's trade, through intermediary merchants, reached clean to China. No merchant, however, traveled the whole distance back and forth from Rome's empire to China. Instead, merchants traveled a certain distance, and then another group took the merchandise along the next stage of the journey, and so on until reaching China. Merchants then returned with goods traded for, by the same method.

Hence, he was free to follow the customs of foreign merchants and other non-citizens of the city of Rome and to develop new forms of action in addition to those of the XII Tables, called *formulae* (forms of action).

Empowered to follow foreign customs and to develop forms of action to accommodate these customs, the foreign praetor fashioned a modern and improved body of procedural and substantive law well suited to the needs of merchants. The advantage of this system over the archaic, wooden, and unbending provisions of the XII Tables, which hamstrung the praetor urbanus, was apparent. Consequently, in 150 B.C., Rome, by statute, likewise empowered the praetor urbanus to also create new forms of action or *formulae* in response to new circumstances. New remedies create new rights; the new statutory power of the praetor urbanus to change procedural law gave him a back-door power to alter the substantive law by formulating new additional categories of litigation, which, in turn, provided a political tool to aid in his reelection. The annual praetorian edict of the incumbent praetor urbanus now included announcements of his new formulae. The praetorian edict thus became both a code of procedure and a source of effecting substantive law.

By 100 B.C., Rome had developed an elaborate and mature system of municipal law, well suited to the government of a large city of wide commerce and much industry,[252] drawing its law from four sources: opinions of jurisconsults, legislation, custom, and the praetorian edicts (procedural) of the praetor urbanus—elected by the people for an one-year term. In theory, these four sources all stemmed from the people as sovereign. From 753 B.C. to 27 B.C., Rome allowed neither amendments to assembly bills[253] nor assembly debate: the assembly merely accepted or rejected proposed legislation. Unlike the British Parliament and the United States Congress—where law authorizes any member of either house, with the exception of tax legislation,[254] to introduce a bill for

[252] Because the civil law is the law for the Roman city and her civilian, the Greek *πολις* (*polis*) and her *ζωον πολιλικον* (*zoan polilikon*)—i.e., meeting the demands of urban society for expediency—, churchman and common lawyers from John Wyclif to William Blackstone and beyond call the civil law *urban* or *municipal* law. Though common lawyers also use the term "municipal" to signify cities having authority by charter from the sovereign for self-government, such as does London.

[253] Forbidding amendments to bills discourages congressmen from adding their pet legislation to bills that they feel confident will become law, hoping their *rider* will pass unnoticed on the coat tails of the popular bill. Disallowing amended riders will reduce pork barrel provisions and pet projects in legislation, lessening unnecessary spending. Any congressional legislation that does not further "the general welfare" is unconstitutional. *See* U.S. CONST. art. I, § 8, cl. 1.

[254] The Constitution requires that all legislation concerning taxation must originate in the lower house of Congress: "All bills for raising Revenue shall originate in the House of Representatives . . . ." *Id.* § 7, cl. 1 (capital letters in original).

consideration—, only the party in Rome holding power claimed right to introduce legislation.

Consul was the highest office in Rome's government. By the first century A.D., the only way for one to become consul was to work up from lesser political offices, one office at a time. The term of each office being limited to one year, a skilled politician advanced upward from office to office quickly. Thus, by the time a man became consul, he had already held many political offices over a series of years, becoming a well-seasoned career politician. Accordingly, the Roman political system became well suited to its civil-law design: production of career political operators able to work, in efficiency and ease, the machinery of city government. Though ideal for ease of administrative control, Rome's urbane system of law and government was unsuited for the observance of individual freedom.

Rome's government was foremost an administrative and bureaucratic system: her obsession was Rome's will; her focus was enforcement. As do modern civil-law governments and administrative bureaucracies, Rome used statutory and regulatory schemes to preempt and preclude disputes arising from natural (private) relationships; any disputes not preempted, she sought to end by foisting upon the parties Roman policy.

Moreover, Roman government required career-minded politicians and government employees to work their way up through the political and civil-service ranks. Such an administrative scheme—widespread among organizations and governments in modern times—encourages career politicians, leading to an even greater drawback: it produces a separate political class of office holders and bureaucrats with scant knowledge of, and therefore lack of appreciation for, the one struggling in the private sector to pay those on the state's payroll. In such cases, resentment often sets in, moving the public sector, in a collective effort to protect its separate interests,[255] to polarize itself from the private sector. Such polarizing of state employees from the wealth-producing private sector occurred in Rome.[256]

Before the empire degenerated into fulsome emperor worship, sovereign power had theoretically rested in Roman citizens dwelling in and about Rome. Then, as imperial power continued to migrate and

[255] For example, it is significant that in our day the country's largest and fastest growing union membership is of government employees, creating further fostering polarization between the public and private sectors.

[256] As the over-balance of power inevitably migrates into the hands of bureaucrats, government will evermore devolve into the *state*. Then, as bureaucrats multiply, misuse, and abuse the ever swelling resources of government available to enforce their will, the power balance will overwhelm and stagnate the wealth-producing non-government sector.

concentrate in the city of Rome, wealth from the empire's reaches flowed into Rome, further increasing Rome's power, but fostering bungling and wasteful politicians. Emperor worship's public idolatry further chilled beneficial developments in law and government. In A.D. 131, Publius Julian revived the old praetorian edicts;[257] emperor Hadrian decreed them perpetual, granting the power to change them to emperors alone. Hence, these annual edicts ceased to be a means for the law's development.

Initially, civil law governed and protected only citizens of the city of Rome. Then in 89 B.C., Rome extended its law to every resident in the Italian peninsula. Further, early emperors sometimes granted citizenship as a reward for service to Rome.[258] For example, serving in Rome's legions qualified a man for Roman citizenship. Finally, in A.D. 212, the emperor extended citizenship to all the Roman Empire's free inhabitants.

§ 2.7.3
Early Civil-Law Training & Method

[The] common law grew along lines far removed from the instructions of the Byzantine emperor Justinian (d. A.D. 565) who ordered his judges to disregard completely the decisions of other courts.[259]

As the Roman Empire grew it needed more tribunals and judges. Consequently, her emperors more and more required praetors, instead of *judices*, to hear cases. Because judices were private citizens and, therefore, harder for the emperor to control, their holding judgeships gave potential for judicial independence. But alas, any judicial independence achieved failed to withstand the imperialistic world-and-life view that had captured Rome's law schools. Much as a judge leans on his clerk nowadays, every Roman judge retained a trained civil-law attorney to serve as his clerk and to give him legal advice.

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[257] In Rome's early times, the *praetor* (*prae-itor* or "one going in front of [the people]") was Rome's highest official. After 247 B.C., *praetors* were second in power only to *consuls*. The *Lex Licinia Sextia* created the office of praetor in 367 B.C., giving the praetor power over claims of citizens of the city of Rome only. Then, as Rome added provinces, she assigned a praetor to each one. *See* BERGER, *supra* note 236, at 647.

[258] For example, Paul of Tarsus was such a Roman citizen—an unusual status for a Hebrew. Paul's Roman citizenship was likely attributable to his father or grandfather having earned that right through military or other service. Paul was quick to assert his rights as freeborn Roman citizen. *See Acts* 22:25–30.

[259] ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 203 (Liberty Fund 1974) (1966).

As are most judicial clerks today, law required these clerks to be law-school graduates: this meant having completed a five-year course of civil-law study at a law school established by Rome—this requirement was in place long before the founding of the Europe's first university at Bologna. By the eleventh century, both the Roman state and private jurists had established civil-law schools throughout the empire. Eventually, however, the only law schools the Roman state recognized were those she had established and continued to control.[260] Rome located these at her preeminent cities such as Beirut, Antioch, and Athens. The standard length of the civil-law-school course of study remains five years.

Most private-law cases in the tribunals of Rome concerned tort law only. Little criminal defense law existed because, if Rome intended to convict, resistance was near futile. Governors of provinces conducted Roman tribunals by inquisition: the governor was not only the judge, but also the prosecutor, determining the facts, applying the law, and deciding the sentence. In 509 B.C., Rome demanded that all capital cases stand for final review before the unorganized militia assembled.

As in civil-law systems today, law in the Roman Empire never guaranteed to the one accused of a crime the benefit of a neutral judge. Yes, civil law provided for appeal to the emperor, if one was a Roman citizen; some—such as Paul the apostle—took advantage of this option.[261] Nevertheless, even in appeal, the emperor's method remained inquisitorial and arbitrary. Moreover, an emperor's judicial decision was indistinguishable from statutes, having the full effect of legislation. His words, when spoken *ex cathedra* (from the seat or throne), were law—as

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[260] When government—i.e., the state—gains a monopoly over education in any particular discipline of learning, creativity and the innovation to scientific discovery will give way to uniformity. All educational institutions are inherently religious because each exists foremost to provide an overarching worldview used to interpret and give meaning to any particular fact taught. Because it provides unity, an overarching worldview is an inescapable necessity of every educational institution. Whether right or wrong, formally or informally, every educational institution will adopt or formulate and assert a worldview as a universal whereby to judge and provide meaning to all facts; if it does not, its curriculum will disintegrate for lack of any unifying principle.

Put another way, a naked or absolute fact, standing alone, is without meaning. Any particular fact only has meaning as it relates to a universal, as a minor premise relates to a major premise through reason. The comparable Latin term is *ratio*, signifying proportionality between two or more objects. God has created all things in proper proportion. Each of His creation's particular things, whether objects or facts, remains meaningless to man until he understands how each particular object or fact ultimately relates to its Creator: the only true, eternal, fixed, and universal standard. Only recognition of relationships, therefore, provides meaning.

[261] *See Acts* 25:11.

"His edicts, Livy tells us, "were esteemed sacred." Even when whispered, the emperor's edicts[262] were as a roar to the incompliant.[263]

Civil-law systems are governments of men—as opposed to governments of law—, consequently, judges are unlimited by finely tuned, court-fashioned rules of analysis called *tests*, as in common-law courts.[264] Further, Roman judicial decisions became increasingly inconsistent as each judge ruled according to that which was right in his own eyes—in a word, arbitrarily. After A.D. 235, *jurisconsults* and emperors, recognizing the inconsistency of judicial decisions, began to consult law books and commentaries for legal guidance; their tradition, however, barred them from looking to the prior decisions of the courts.

Then, in A.D. 426, intending to maintain personal control over the courts, emperor Valentina III issued two decrees depriving his judges of the power to decide cases by analogy to previous decisions. The first commanded that judges render their decisions *directly* from the text of *Gaius's Institutes*,[265] published 200 years before; the second was the negative expression of the first: in all events, judges must ignore case precedent. About this time, Rome's emperor set up the central British court at York, empanelling three judges under the emperor's official edict against using, or even consulting, precedent.

Civil-law ideals have always forbidden the use of precedent because civil lawyers believe that precedent encroaches upon the perfected precision of the state's legislative will. Thus, Justinian's decree followed that of Valentia III; both were unbending:

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[262] See generally § 5.1.7 of this book (discussing the civil-law technical term *dogma*, with examples of its use from the ancient world and from Scripture).

[263] Whether from one man as legislator or a body of men as a legislature, our Constitution forbids legislation aimed at a single person or a targeted group of ascertainable members upon whom that legislation is intended to inflict punishment. At the time of the Constitution's drafting, bills of attainder were understood as legislative exercises of judicial power by Parliament without due process: notice and a genuine opportunity to be heard. Such focused legislation, targeting some but not all, also violates the Equal-Protection Clause of the Constitution and the bar against selective prosecution. Such retributive legislative acts, oft justified by notions of popular will, are foundational to civil-law ideology.

Sir Henry Sumner Maine reminds us that the Athenian Bill of Pains and Penalties—εισαγγελια (*eisanggelia*): special legislation directed toward an individual, commanding punishment of an act judged contrary to the will of the state, but never having been defined to be a crime before the offending act—, survived the establishment of regular civil-law tribunals. Now called a Bill of Attainder, the Constitution forbids such legislation. *See generally* U.S. CONST. art. I, § 9, cl. 3 (forbidding Congress to pass any Bill of Attainder); § 10, cl. 1 (forbidding any of the several states to pass any Bill of Attainder).

[264] See generally §§ 4.5–4.5.2 of this book (discussing such *tests* called "rules of law" in the common-law tradition, in the ancient world, and in Scripture).

[265] History knows little about Gaius; some have opined that Gaius was a woman.

> No judge or arbitrator is to deem himself bound by juristic opinions (*consultationes*) . . . Decisions should be based on laws, *not on precedents*. This rule holds good even if the opinions relied upon are those of the most exalted prefecture or the highest magistracy of any kind.[266]

All other sources for law shut out, a single source of Roman law emerged for use in Roman tribunals: judges had to follow what was in statute books, the legislative expression of the Roman state's will. Understood as imperial Rome's commands, these statutes were equivalent to the emperor's decrees. Civil-law jurists held Rome's statutes in veneration, as later the church reformers' esteemed God's written Word. Nonetheless, as with all of man's prospective applications of law, Rome's statutes were conflicting and patchy; if the Code failed to speak to the facts before the tribunal, the judge, being barred from consulting guidance outside the Code, was left to follow his unguided and, therefore, arbitrary interpretations of Roman statutes. Moreover, these statute books were unavailable at remote locations—especially in outpost tribunals far removed from Rome, as was York in Britain.

At bottom, by imperial command, judicial decisions had to follow the emperor's decrees, which included the *Institutes of Gaius*, for he had sanctioned these as his own decrees. Even though judges were under command to follow the language of this Code, it remained unavailable in the many remote locations of the empire. Thus, in the far-off Isle of Britain, Roman judges seldom applied Gaius' *Institutes*; therefore, British life remained unaffected by it. In a word, the unavailability of Rome's statute books worked to advantage in Britain by thwarting civil law's firm establishment there. Of most significance, the emperors' universal prohibition against following judicial precedent made official Rome's institution of this civil-law fundamental, which she then justified, strengthened, and spread to the known world through her university system, beginning at Bologna, Italy.

Even if Rome's Code had been available, its failed aim of addressing all future behavior rendered it incomplete. The civil law's barring of Roman judges from consulting prior decisions forced them to arbitrary interpretations and fictions, as occurs yet today. In short, by binding Roman judges to the language of her Code and forbidding them from

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[266] C.K. ALLEN, LAW IN THE MAKING 168–69 (1958), *quoting* CODE JUST., 7, 45, 13 (emphasis added).

consulting the wisdom from prior cases, the civil-law tradition closed the door to truth and equal protection of the laws.

Where judgments are conflicting, litigants are unable to predict what a court, given certain circumstances and facts, will do. Without this measure of confidence in the courts' reaction to a given legal conflict, a people will become, to that degree, unsettled. Such lack of confidence in the law's application brings fear of the unknown and pause to speak and act in forthright boldness: relationships weaken; audacious activity chills; productivity wanes.

§ 2.7.4
The Writings of Gaius

In the old Roman Republic, was an elaborate distribution of powers, but in time all were gathered into one hand.[267]

Gaius and his followers theorized that *the people* were sovereign;[268] his writings appealed to the republican theory of old Rome. Even though Gaius wanted to lodge power in the people, he still saw the source of the people's power in the emperor, with the people bearing power only by his permission and grace.[269] Commendably, in the old Roman republic

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[267] THOMAS JAMES NORTON, UNDERMINING THE CONSTITUTION: A HISTORY OF LAWLESS GOVERNMENT xii (1950). Rome's Babylonian worship made imperialism inevitable.

[268] Sovereignty believed to be in *the people* collectively, is often a sincere, but nonetheless dangerous notion that, if realized, will result in chaos requiring a leader invested with god-like powers and dictatorial power to restore order. As Roman history shows, where a people deem human divinity a potential—whether in a sovereign majority, sovereign legislature, or sovereign legislator (dictator)—, demagogues will exercise god-like powers. See generally §§ 5.3.5–5.3.5.2 of this book (discussing the dangers of democratic theory).

[269] From time out of memory, the law has held that he having the power to lend has also the power to repossess. In the depths of his calamity, Job declared of his former possessions: "The LORD gave; then the LORD took. The name of the LORD shall become the *most* blessed." *Job* 1:21b. All indications are that the book of *Job* predates the writings of Moses. Job affirms the right of the lender to also take away that which he has lent. So also, our organic law declares that those governing cannot separate the individual from his fundamental rights: no man has granted these rights; therefore, no man can ever take them away. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Government too often abuses one's inalienable rights by treating those rights as though they are alienable. To do so, however, is to usurp the place of man's Creator, who alone has composed and bestowed these rights. Since, therefore, any authority and power government has, the Creator has lent, and only the Creator has the power to take these from government. The key question is whether God only gives such authority direct to one man, or a select group of men (as civil law teaches); or whether God bestows such authority direct on every individual (as Scripture and common law teaches), these individuals then lending authority to public servants to administer government on behalf of, and for the benefit of, those having lent authority to them. If individuals lend authority to public servants so that

Roman citizens chose their magistrates, who then exercised unlimited powers. *Corpus Juris Civilis*—the basis of modern civil-law systems—teaches that government officers are responsible only to the state: either the emperor and his magistrates, or the legislature. By contrast, the traditional common law recognizes that the Creator dispenses authority (right), and therefore power, directly to each individual. Further, the one having the power to give (God) also has the power to take away. Gaius' ideas, on the other hand, put the individual's authority in the fickle hand of the emperor, a precarious notion.[270] The state remained total.

In later centuries, the Roman pontiff, following Gaius, continued to maintain that the fountain of all power is God—however the bishop of Rome chose to Him. Further, Rome taught that the emperor, not the individual, is the immediate recipient of God's authority and power on earth. Contrary to the Declaration of Independence,[271] Gaius taught that it is impossible for deity to dispense authority, power, rights, or even grace, directly to the individual. On this point, the Roman Church adopted Gaius' notion, lock, stock, and barrel, and applied it to the pope as the immediate recipient of divine power, who then, says Rome, dispenses it by his imperious breath, to whomever he pleases.

Thus, the theories of both the early Roman republic and Gaius held out mere men as sovereign, i.e., without law's limit. In addition, under both the theories, even though the majority could oust an undesirable magistrate at the next election, he remained above the laws governing the people. In short, law applied only to the people and never to the state. The state, therefore, was without limit or *total*. Further, since the emperor embodied the state, the emperor was beyond challenge, especially by the courts.

Having begun on a false understanding of authority's source, logic led civil law to a further false conclusion: since the law did not limit the emperor (in theory), he was unable to transgress the law. Put another way, the emperor and those following his cravings could do no wrong. In the emperor's case, might made him right and greatness meant goodness. The emperor was the state personified and his government was

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those public servants will administer government for those individuals' benefit, but fail to do so, it follows that those individuals also have the right to take back that authority and bestow it on others.

[270] See generally § 3.7.5 of this book (discussing the distinction between common law and civil law as respects authority's source and as articulated by John Wyclif and his predecessors).

[271] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

unlimited. The government holding all potency, none remained to the individual.[272]

Roman citizens had no redress for abuses resulting from the doctrines of the old Roman republic and Gaius. Fortunately for the Romans, most emperors—as do many leaders in civil-law countries in our day—restrained themselves from notorious abuses of their power because they understood that the public's perception of their self-restraint contributed to the good will of all toward their commands and the continuation of their own power. Civil law, nevertheless, gave opportunity to tyrants, such as Nero and Diocletian. In modern times, such opportunity for absolute power remains available to chiefs-of-state in civil-law systems. Obviously, the communist governments of China and North Korea exercise absolute and constant power; in lower Mexico, local governments abuse the powers afforded by the civil law. To the shock of many, Boris Yeltsin took advantage of this power and dissolved the Russian Parliament; on 2 October 1993, using tank artillery, Yeltsin cleared the Russian parliament building of the elected legislature.

Czarist Russia, Franco's Spain, Napoléon's France, Hitler's Germany, Mussolini's Italy, and Central and South American dictatorships have all used the principles of Roman civil law to achieve lawless ambitions. Residents under these systems have been without redress for abuse of their God-given rights. French dictators were able to put a man in the Bastille forever and without cause.[273] Civil law's princes bear no obligation to protect citizens.

Even though Gaius' ideals of the old Roman republic purported to have promise, these ideals were empty utopian shells, akin to those later enacted by Justinian's Code. Even though the Roman Republic worked out an elaborate distribution of powers, Rome arranged these powers in support of civil-law fundamentals: around a false religious center that, in time, gathered all functions of government into one hand of a single

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[272] The potential of a people is inversely proportional to the amount of power which that people yields to the state. The Framers followed the common law, intending that our Constitution limit the government only, and not the private individual. De Tocqueville observed that America is great because America is good. The Romans, by contrast, accepted the emperor to be good, because he was great of power and prestige; an attitude fostering tyranny: rule by those claiming authority (right), by inducing fear through calculated shows of power (might).

[273] *See generaly* CHARLES DICKENS, A TALE OF TWO CITIES (1936) (1859). Though a novel, Dickens, in the *Preface* of his first edition of 1859, says, "Whenever any reference (however slight) is made here to the condition of the French people before or during the Revolution, it is truly made, on the faith of trustworthy witnesses."

will.[274] From the first, Rome had built her civil law and government upon Babylon's mystery religions. These false foundations, laid by the family priests, culminated in emperor worship, in the end giving way, toppling the great empire's towering forms.[275] Nevertheless, Rome's civil law remains in un-waning global aggression.

§ 2.7.5
Civil Law Claims Scripture's Title

If, indeed, you fulfill sovereign law according to the Scripture,
"You shall love your neighbor as yourself," you do well.[276]

The *Basilica*, an abridged Greek summary of Justinian's Code, remained the law of Greece until after World War II. Named after its initiator Basil, it is, at points, a literal translation of Justinian's text. Greek writers termed it *βασιλικος νομος* (*basilikos nomos*: viz., "law of the king" or sovereign law). Basil the Macedonian, emperor of Byzance, initiated the *Basilica* in sharp criticism of Justinian's method of organization; Basil's son, Leo the Wise, then completed Basil's work.[277]

The ancient Roman world used the phrase *basilikos nomos* often, both in and out of Scripture. Consequently, its meaning is clear, shedding understanding upon the ancient world's perception of Roman civil law. Two examples, each from opposite ideologies of the religious and legal spectrum, are noteworthy: the first from Scripture and the second from a pagan inscription in ancient Pergamos.[278]

In *James* 2:8, the apostle uses *basilikos nomos* (sovereign law), to signify two concepts: God as the only fountain of all Scripture and Christ's admonition to love one's neighbor. In the ruins at ancient Pergamos, the pagans used the same phrase in the accusative case (*βασιλικον νομον: basilikon nomon*), to form part of the heading of an

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[274] *See* THOMAS JAMES NORTON, UNDERMINING THE CONSTITUTION: A HISTORY OF LAWLESS GOVERNMENT xii (1950).

[275] Rome transferred the Babylonian title, office, and cultist trappings of the family *pontifex maximus* to the Roman emperors, who later transferred it to the high priest of the city of Rome.

[276] *James* 2:8.

[277] *See* BERGER, *supra* note 236, at 372.

[278] John the apostle identifies Pergamos with the throne of Satan: "And write to the messenger of the church in Pergamos, I know where you are residing, where Satan's throne is . . . where he resides." *Revelation* 2:12–13. See generally § 2.3 of this book (discussing Pergamos as Satan's throne and the transfer of the complimentary trappings of Babylonian priestcraft and statecraft from Babylon, through Pergamos, to Rome).

inscription likely from the time of Trajan's reign (A.D. 98–117), not many years after James epistle.

The inscription heading—whether one takes it in its entirety or considers only its phrase *basilikon nomon*—gives the intent of the inscription under that heading: to present the emperor as the sovereign and exclusive source and establisher of his law. Taken in its entirety and by the letters, it declares of the emperor: "He set up the imperial law out of his own." (*τον βασιλικον νομον εκ των ιδιων ανεθηκεν: ton basilikon nomon ek ton idion anetheiken*). Translated for smoother English it reads, "He made the sovereign law and established it himself."

The heading's phrase, *basilikon nomon* (sovereign law), taken in isolation, also signifies the emperor as the sovereign fountain of the law: i.e., law from the mind of the emperor, i.e., imperial law. In like fashion, in *James* 2:8, the apostle uses *basilikon nomon* to signify the Scriptures' (God's law) origin in the mind of God.[279] To conclude, in both the Pergamum inscription and in *James* 2:8, each writer intends *basilikos nomos* to denote *the* lawgiver: the supreme legislator and final arbiter of right and wrong from whom there is no appeal.

Though Deissmann never cites the Pergamum inscription's use of the genitive—*εκ των ιδιων* (*ek ton idion*): "out of his own," viz., out of himself—in further support of the foregoing conclusion,[280] the careful investigator will note that the genitive case often signifies the source or origin from which a thing springs. Further, in *Acts* 12:21, *βασιλικην* (*basilikein*) signifies sovereignty: the suffix *–ικην* (*–ikein*), when appended to *basil-* (*basil-**ikein***) and considered in its narrow sense, indicates that which is characteristic of, or belonging to, that to which it is appended, as having its origin in it.

Therefore, the Basilica Code's title *Basilikos Nomos*, indicates that the ancient civil-law tradition recognized the emperor—the divine incarnation of the state and the empire personified—to be the source of this version of Justinian's Code. *Basilikos Nomos* is the imperial assertion that the emperor is lawgiver supreme: the semi-deified earthly

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[279] James the apostle reverses the order of the two Greek terms and inserts the governing verb between them: *νομον τελειτε βασιλικον*. James's differing arrangement of terms does not change their import from that of the Pergamum Inscription, but does stress the relationship of God's people to God's Word (the sovereign law) through obedience. *See James* 2:8.

[280] *See* JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 105 (1930). *See also* WALTER BAUER, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE 136 (William F. Arndt & F. Wilbur Gingrich trans., 5th ed. 1979) (1958).

god. The emperors in Pergamos did as pope Gregory VII later did in 1087; they usurped Scripture's authority by supplanting it with another law. The emperors of Pergamos used the Basilica Code, their version of Justinian's Code; Gregory VII used Justinian's Code.

At the time of the Pergamum Inscription (*circa* A.D. 75–125), the city of Pergamos had the Scriptures, to which it added forms and trappings of imperial-church idolatry. It appears, in light of the inscription, that the emperor of Pergamos took the title for his law from *James* 2:8, attempting to attach scriptural credibility to the Basilica Code.

§ 2.7.6
Justinian's Code:
Civil Law Compiled

> *The answers of the emperor were called rescripts, and these had . . . the force of perpetual laws . . . Macrinus . . . could not bear that the hasty and crude answers of . . . princes . . . should be reverenced as laws . . . But Justinian thought otherwise, and he has preserved them all.*[281]

The systemizing of civil law ideals began at Babylon. As Pollock and Maitland point out and as history reveals, the ideals of Rome's civil law are rooted in Babylon. *Roman*, however, became a popular adjective for *civil law* because the Roman emperor Justinian[282] first compiled and organized Babylon's tradition of law from the and codes of earlier Roman emperors into a single written code and held it forth as the perfected and universally applicable body of law. Touting his Code to be incapable of improvement (i.e., perfected) and hoping to preserve what he believed to be its integrity, Justinian determined—as did Napoléon and Bismarck concerning their versions of this Code—to keep scholars and judges from compromising his Code through interpretation.[283] Justinian, therefore,

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[281] 1 BLACKSTONE, *supra* note 12, at 58–59.

[282] In A.D. 529, Justinian struck a blow against Greek paganism by closing the school of Greek philosophy at Athens. *See* EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 135 (1979). Justinian's understanding of law and government and the fashioning of his civil-law Code, however, remained decisively Greek in fundamental character.

[283] Justinian longed that others regard him as the *lawgiver*, a designation used in the ancient world to signify a judge with the power of final interpretation of law:

> John Chipman Gray in his *The Nature and Sources of the Law* (1921) repeats a number of times a quotation from Bishop Hoadley (1676–1761): "Whosoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes and not the person who first wrote or spoke them.

forbade anyone to add to, take away from, or use outside authority as an aid in interpreting his Code. Justinian claimed for his Code that which the Word of God written claims for itself: perfection[284] and the right to honor as a completed body of truth, ample for the government of all men at all times, and its own best commentary of itself.

In A.D. 534, Emperor Justinian I, ruling from Constantinople, compiled and published his *Code of Justinian*. More precisely, it was a republished compilation of the codes of previous Roman emperors. Justinian had instructed his chosen law professors and jurists to rework and integrate all of the former Roman codes used from A.D. 117 (the end of Tarjan's reign) to A.D. 534—including the *Theodosian Code* of A.D. 234, the *Old Roman Statutes*, and the *Gregorian Code*—to produce the *Code of Justinian*. Compiling about 4200 statutes, Justinian's Code includes the *Institutes of Gaius*, an elementary hornbook[285] used as a first-year civil-law school textbook. Justinian, however, never provided a collective title for his codification of Roman law; only once does he mention the *omne Corpus Juris* (the entire body of the law). It was not until 1583 that Dionysius Gothofredus, in his publication of Justinian's Code, used the title *Corpus Juris Civilis*.[286]

The chief personality behind Justinian's Code was Tribonianus:

> [Tribonianus was] Justinian's principal collaborator and advisor in his legislative work. He . . . also presided over the commissions, which composed the Institutes, the Digest, and the second Code. Hence, the changes made by the compilers on the texts collected for Justinian's codification are termed in the literature *emblemata Triboniani* ("Tribonianisms"). He died about A.D. 545 . . . Tribonianus was the most prominent personality of Justinian's epoch. The emperor speaks of him with the highest praise.[287]

LON L. FULLER, ANATOMY OF THE LAW 23–24 (1968), *quoted in* BLACK'S LAW DICTIONARY 892 (7th ed. 1999). Modern civil-law states remain consistent on this point, requiring the single will of the legislator or legislature to control judges and their interpretation of legislation.

[284] *See Deuteronomy* 4:2, *Revelation* 22:18–19.

[285] Common lawyers use the term *hornbook* to signify any of the law student's beginning textbooks. Originally, however, the term "hornbook" alluded to the nineteenth and early twentieth-century schoolchild's small parchment, bearing the alphabet, placed in a frame with a handle on it, and covered with a transparent layer of thin material peeled from a cow's horn, as one peels thin transparent layers of skin from an onion.

[286] *See* BERGER, *supra* note 236, at 417. The writer uses the titles *Corpus Juris Civilis* and Justinian's Code because of their modern familiarity.

[287] E. STEIN, BULL DE LA CLASSE DES LETTERS, ACADAMY ROYALE DE BELGIQUE 23 (1937), *referred to in* BERGER, *supra* note 236, at 742.

The *Code of Justinian* thus consisted in legislation from earlier emperors, who others reckoned to have sat in the place of the gods; whose decrees and dogmas, therefore, men deemed flawless because they were ex cathedra. Nevertheless, as with all intended expressions of law wholly dependent upon mere men, these emperors' decrees and statutes were fraught with inconsistencies, latent and patent. In preparing Justinian's *Digest*, Justinian's scholars consulted two thousand books, including those of thirty-nine legal writers. The *Code of Justinian* included the *Institutes* or *Gregorian Code*;[288] the *Pandicts of Digest* or *Hermogenian Code*;[289] the *Code* called *Old Roman Statutes* or *Law of Citations*, which provided for new legislation and amendments;[290] and the *Digest* or *Novellaes*, called *New Statutes* or *Theodosian Code*.[291]

Composed of three sections,[292] Justinian's Code went through two subsequent revisions: the *Basilica*[293] and the *Hexbiblos*.[294] Each revision sought to fine-tune its predecessor, while retaining the Babylonian fundamentals that distinguish civil law from common law.

After A.D. 90, the Roman popular assembly legislated no more, while the senate enacted what it intended to be the equivalent of laws. Nevertheless, from A.D. 117, until the fall of Constantinople to the Turks in 1453, the only genuine Roman legislation was by *imperial edict* or *dogma*:[295] the emperor's will as expressed by his word was Rome's law. Like the Babylonian settlers, the Roman populous needed no official proclamation stating that the emperors' edicts were divine commands;

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[288] Promulgated A.D. 295.

[289] Promulgated A.D. 324.

[290] Promulgated A.D. 426.

[291] Promulgated in A.D. 438, the *Theodosian Code* remained in force in the East until A.D. 529 and in Italy until A.D. 554. This Code uses the term *pontifex* only in reference to the imperial bishop at Rome; when referring to the leaders of other churches it uses *επισκοπι* (*episcopi*): conjoining the preposition *επι* (*epi*: over) and the root *σκοπος* (*scopos*: a distant object to look at and aim for), with the resultant meaning *overseer*. In the pre-Christian Greco-Roman tradition, *επισκοποι* (*episcopoi*: plural form) were agents sent into subdued cities to administer government. The imperial Eastern Church's *pontifex*, being one with the imperial state, sent his *episkopoi* among subdued people to administer his will. *See Codex Theodosianus*, lib. xvi. tit. 1, leg. 2, 3.

[292] Repromulgated *circa* A.D. 874, the Byzantine compilers of Justinian's Code set forth the official version in Greek, in three sections: *Νομος Γεοργικος* (*Nomos Georgikos*: compilation of land law), *Νομος Ρωδιον Ναυτιχος* (*Nomos Rhodion Nauticos*: compilation of maritime law), and *Νομος Στρατιοτικος* (*Nomos Stratiotikos*: compilation of military law).

[293] Promulgated A.D. 888.

[294] Promulgated 1345.

[295] See generally § 5.1.7 of this book (discussing the civil-law technical term *dogma*, with examples of its use from the ancient world and from Scripture).

eager for imperial power, they deemed them divine. Thus, to question an emperor's *edict* was to endanger one's life.[296] Rome's emperors, therefore, having the power to make law, were the law. The emperors were the Roman state personified and their word was the government; not being under the law, the emperors were deemed the springs of law: the standard of right and wrong for all others. Such imperial theories establish the traditions of civil law.[297]

§ 2.8
Civil Law Spawns the Imperial Church

The king of Babylon [Nimrod] built a bridge across the Euphrates River and gave himself the title of the great bridge builder. The title was transferred, centuries later, to a king of Asia Minor [Attalus of Pergamos], was taken by the Caesars, and finally fell to the popes who boast in it today, Pontifex Maximus.[298]

Before A.D. 312, Christianity, following the pattern of Scripture, recognized authority in the elders (presbyters) of each assembly, whether located in a town or a rural meeting place.[299] In the Roman Empire, the Latin tongue prevailed in the West, while the East retained the Greek language.[300] After the victory of Constantine I over his brother-in-law Maxentius, north of Rome at the Milvian Bridge on 28 October A.D. 312, Constantine made an alliance with the church at Rome. At that time, the other churches in the empire kept a real, but loose, association with the church at Rome.

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[296] "Kings are earth's god's"; said Shakespeare's Pericles, "in vice their law's their will, and if Jove stray, who dares say, Jove doth ill?" Where civil law is in force today, such imperious state power is available.

[297] For political reasons, in past as well as in modern times, civil law's chiefs-of-state have seldom wielded their claimed prerogatives of unbridled power consistently or notoriously. Such power, nevertheless, remains on the low flame of the back burner, kept an ever-ready option.

[298] DONALD GREY BARNHOUSE, THE INVISIBLE WAR 194 (1965).

[299] *See Titus* 1:5, *Acts* 14:23. *πρεσβυτερους* (*presbuterous*), translated "elders" in these verses is, by its suffix *–τερους* (*–terous*), a comparative term denoting older (*more* mature) men. The term is a continuation in the Greek tongue of the Hebrew הזקנים (*ha-zakanim*): from the singular זקן (*zacain*), originally signifying one who wears a beard. From the older men of Israel arose magistrates and judges of tribes, towns, or localities. Related designations are זקניבני ישרעל (elders of Israel) in *Exodus* 4:29, and זקני העם (elders of the people) in *Exodus* 19:7 and *Numbers* 11:16, 24. From this Hebrew tradition of government stems the custom of the early church to appoint elders in every town. The comparable Anglo-Saxon term is *witan*, signifying those men with grey heads.

[300] In A.D. 752, however, New Rome (Constantinople), the capitol of the Roman Empire, lost control of the city of Rome, further separating the empire in twain, isolating east from west.

Just before this battle, Constantine declared to have seen a vision of the cross with the words written in Latin, "In this sign you shall conquer." Though Constantine may have confused these words with his family's worship of the sun god Apollo,[301] he then, nonetheless, proclaimed to his soldiers, "If we win the battle, we will become Christians." Constantine won, professed the Christian religion, and beginning with him, succeeding Roman emperors held powers over the churches of the empire. For example, the emperors convened all church councils, and their appointed bishops acted as local chief judges. Initially, the bishop of the church at Rome was equal in rank to other bishops: he held no preëminence among bishops of other local churches. He did enjoy, however, closer nearness and access to the emperor, which translated into a less-than-holy union of power and preëminence among other bishops.

About the turn of the sixth century, a civil lawyer, Gregory the Great (A.D. 590–604), promoted the notion that the bishop of Rome[302] was

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[301] *See* David Wright, *Constantine the Great, in* DICTIONARY OF THE CHRISTIAN CHURCH 257 (J.D. Douglas ed., 1978). That the source of Constantine's claimed vision of a cross was, at bottom, pagan is made further likely in that Scripture nowhere indicates that the Romans and Jews crucified Jesus Christ on a cross beam attached perpendicular to an upright wooden post or timber. *See, e.g., Deuteronomy* 21:22, 23; *Joshua* 8:29, 10:27, for use of the Hebrew עֵץ (*ets*: tree or timber); *Acts* 5:30, 10:39, 13:29; *Galatians* 3:13; 1 *Peter* 2:24, for use of the Greek *ξυλον* (*kseeulon*: tree or timber).

Until recent decades, the English word *tree* signified a strong length of wood, whether living or felled, and if felled, fashioned for man's use: *e.g.*, "single *tree*," the wooden cross piece to which hitches on each end the tugs of a single horse's harness; and "double *tree*," a longer wooden cross piece to which attaches on each of its two ends a single tree. Though the Romans likely crucified some on crosses of wood, the vocabulary of the Bible disallows any such conclusion in the case of Christ's execution, except reasoning from silence, which is no reasoning at all. Moreover, such guessing is neither necessary nor even helpful to understand the sacrifice of Christ. That the Romans executed Christ by nailing Him to a tree or timber is clear; that it was a *cross* lacks reliable evidence.

Though the symbol of the cross, without question, stems from Babylonian tradition, it has nevertheless waxed strong as a supposed Christian symbol, "cross" even being found in popular English translations of the Bible for the Greek *σταυρος* (*stauros*: stake or wooden post set upright, without any cross piece). *See, e.g, Matthew* 27:42, *Mark* 15:30, *Luke* 23:26, *John* 19:31, 1 *Corinthians* 1:18, *Galatians* 5:11. During the years A.D. 313–321, Constantine minted coins bearing the inscription *soli invicto colitis* (to the sun, my unconquerable companion)—strong evidence that he remained pagan.

[302] Gregory called himself *pope*. In Greco-Roman (Hellenized) culture, *poe-pee* was a baby's first attempt at addressing his father; the fair English translation being *papa*. *But see Matthew* 23:9. The destructive invasion of the Goths into Rome ended in A.D. 415, when they left for Spain; thirteen years later, the Lombards invaded Rome. The Lombards' leaders soon ran out of money to pay their army, which began to plunder the city; in order to assuage Lombard's unpaid and hungry soldiers from further spoiling Rome, Gregory the Great offered church monies to pay their wages. Gregory's act spared Rome further destruction and gained for Gregory the title "Savior of Cæsar's Empire," bolstering the universal power of the Roman bishop—at least within Rome's territories. Gregory's new

head of the universal (Latin: *catholic*) church with unlimited authority over all other local churches—doctrines convenient for him and for the emperor. During the latter eleventh century, in a move intended to make Gregory the Great's claims a practical reality, pope Gregory VII (1073–1085) claimed authority over all other kings and their lesser princes, including authority to remove them from power at will and to appoint other princes and priests to their positions. He further claimed for the Roman pope the right to levy taxes and hear final appeals from all individuals and nations concerning all matters, temporal and spiritual. Gregory VII recorded these averments in a document called *Dictatus Papae*. Even though likely authored by Cardinal Deusdedit, the document crowns the expressions of Gregory's ambitions during the twenty years he controlled the papacy from behind the scenes, before he was crowned pope:

> [*Dictatus Papae*] clearly expresses Gregory's ideal for the papacy . . . The peak of papal pretension to supremacy was reached in the twenty-second article of the *Dictatus* with the statement that there had never been an error in the Roman Church and . . . that . . . it never would error.[303]

In addition, Gregory VII moved the pope's headquarters to the Roman emperors' old Lateran Palace; having now claimed the powers of the old Roman emperors and having expanded these powers to cover the globe, he set up shop in the throne room of the old Roman emperors,[304] where the pope's headquarters remains to this day. The pope then took the title *Augustus* from Julius Cæsar, the first Roman emperor to exploit this appellation fully. Many of the popes have been civil lawyers, which equipped them to expand their powers under civil-law theories; thus, they did. The pope of Rome, said Edward Gibbon, is the ghost of Rome, sitting on the grave of Rome, and—one may rightly add—wielding the civil law of Rome.

Rome's early popes appropriated the title *pontifex maximus* from the ancient Roman kings and used it to identify with the imperial successes

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title was a fresh expression of messianic Roman statism: the savior was Gregory; the empire was Cæsar's. In church and empire, imperial Rome further solidified the world's perception of its singular and universal essence and power; the Roman state continued as *total* by placing Christian labels and names on Roman paganism.

[303] EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 229 (1979), *citing* 3 B.J. KIDD, DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE CHURCH 129–30 (1941).

[304] In modern times, the pope of Rome sleeps in the Vatican, but his official headquarters is the Lateran Palace.

of Rome.[305] *Pontifex* is the old Latin word for "priest"; its etymology traces to Babylon and the idea of "bridge builder."[306] Consistent with the function of a priest to span the chasm between humanity and deity by representing men before deity, the bishop of Rome claims as his exclusive office to span the gap between God and mankind as mediator: *vicar* of Christ.[307] Then, Boniface VIII, by a papal bull of 1298,[308] used the civil law's notions of semi-deification to reaffirm papal absolutism,[309] announcing that the Roman pope is God's supreme chosen man on earth, that the pope owns the entire earth, that the pope has all authority over all on earth, and that the world's princes are the pope's servants.[310]

European princes were attracted to these theories, not for the pope's sake, but only as they could use them to their advantage upon others. Europe's princes, therefore, in opposition to Boniface VIII, determined to use the civil law to also gain a god-like status among their own people. In

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[305] See generally §§ 2.6.2–2.7.1 of this book and accompanying notes, for background of Rome's exploits.

[306] Following in the tradition of Nimrod, Constantine called his chief priest *Pontifex* (bridge builder) *Maximus* (chief).

[307] Greek, *αντι χριστος* (*anti-Christos*): meaning, "in place of Christ," in the sense of a mirror image or equal; transliterated *anti*-Christ. See generally §§ 3.8.1–3.8.2 of this book (discussing the divine-right-of-kings theory, John the apostle's reference to this concept, and the common law's aversion to it). Christ is the only authorized mediator between God and man. Scripture, therefore, excludes mere human priests from usurping the mediating office of Christ (*see* 1 *Timothy* 2:5). Further, by forbidding necromancy, Scripture also forbids invocation of (praying to) the dead (those departed from this life on earth) as intercessors and mediators between men and Christ. *See Deuteronomy* 18:11.

[308] *Bull* is Latin for "round," "knob," or "bubble." Rome forms her papal bulls in the shape of a football, seals them with a lead seal or *bulla*, and wraps them in gold foil.

[309] Absolutism is the atmosphere that hovers about a dictator whose raw power is arbitrary and unbridled—without restrictions, balances, or checks—, while fawning devotion feeds his arrogation.

[310] The arrogations of Boniface VIII were according to that monstrous system of the bull *Unam Sanctam*. Issued in 1302, in it Boniface decreed: "He who denies that the secular sword is the power of Peter does not understand the words of the LORD." The "power of Peter" is a circumlocution for the bishop of Rome. From Boniface's *Unam Sanctam*, Rome gathers her *two-swords theory* of papal power: first, the Roman pontiff wields the sword of canon law and papal decrees in absolute power directly over the affairs of the Roman Church and her devotees; second, in absolute power indirectly over the affairs of state through the state's rulers.

In 1870, to reinforce the bull *Unam Sanctam*, Rome declared infallible all previous and future decrees issued from Rome's papal throne (*ex cathedra*), including Boniface's *Unam Sanctam*. Since 1870, Rome has therefore attempted—albeit without a consensus among her scholars—to find a complete list of papal decrees. Though some Roman priests claim that Henry Denzinger's *Enchiridion Symbolorum* (1819) includes a complete list of Rome's *ex cathedra* decrees, the late John Gerstner disagrees. "No such list," says Gerstner, "has ever existed." Rome's canon law consists of selected legislative decretals of the various popes issued by Gregory IX as his personal legislation in 1234. This list, however, being only selective and omitting entirely all decretals after the year 1234, qualifies not as a complete list of papal decrees.

the year 1500, church reformers and others seeking the favor of European princes published pamphlets using Justinian's Code to justify the absolutism of European monarchs, arguing that every prince, in his own realm, was as god on earth. Because the Roman Church was dry of true spirituality, in need of revival and reformation, and had failed to answer these needs, except with inquisition's heavy hand, the times were ripe for the rise of nationalism. By teaching and exercising the imperial power of the civil-law state, the pope gave imperial notions to other European princes as much as to the Roman priesthood, thereby stoking the fires of nationalism, which helped protect the Reformation from Rome's envy.

Men then linked the doctrine of princes' absolute powers to the notion that God appoints heirs to royal thrones by heredity, thereby strengthening the divine-right-of-kings doctrine. In a day when a high percentage of infants died, hereditary kingship was an acceptable idea to promote to people. The argument went thus: only infants favored by God survive; therefore, the survival of a prince's child is God's affirmation of his or her heirship to the throne. In short, only those fit to rule will survive; only those fit to survive will rule.[311]

In 1495, the Holy Roman emperor Maximillin announced that he alone was the court of last resort respecting all matters concerning men and nations, temporal and spiritual; notably, he based his claim on Justinian's Code. Since the founding of Babylon, civil law had always offered this power to princes; Maximillin chose to use it, as had many other demagogues before him and as have many after him. In 1517, Martin Luther—following John Wyclif[312] and Wyclif's disciple Jan Hus[313] of Bohemia—inadvertently launched the Protestant Reformation on the European continent. The Roman pope and the holy Roman emperor opposed Luther because his teaching threatened their power; but princes of Saxony such as Fredrick the Elector protected Luther because by

[311] Academia has given Charles Darwin too much credit for the originality of his ideas. Evolution's *survival of the fittest* has been at the center of Babylonian religion, law, and government since Nimrod; tyrants have used it to justify domination and abuses wherever they believed others were gullible enough to swallow it. *See generally* CHARLES DARWIN, THE ORIGIN OF SPECIES (London, Penguin Books 2003) (1851) (setting forth Darwin's theories of survival of the fittest, natural selection, and evolution).

[312] Through the centuries, the spelling of this early reformer's name has varied. Because short and simple, the writer uses the spelling *Wyclif*. The painting of John Wyclif that hangs in the old dining hall of Oxford University's Balliol College displays the now uncommon spelling, *Iohn Wycklyf*.

[313] *Jan Hus* is the Czech spelling. The English-speaking world, however, knows this brave man by the name John Huss.

threatening Rome's power, Luther's teaching encouraged the German princes' power.

Luther saw the supremacy of God's Word written, but imperial Rome taught the supremacy of perfected human reason in Justinian's Code. Luther, who began his university training as a civil lawyer,[314] persuaded German princes to be absolute emperors in their own realms, thereby denying universal power to the pope. Though Luther's teaching justified the Saxon princes' imperial power, squelching the power of Rome, it entrenched Roman civil-law statism in Saxony:

> In the civil law world, the movement toward the extremes of the inquisitorial model was impelled by the revival of Roman law. The influence of canonic procedure, and, most important, the rise of statism . . . The prince as the personification of the state had the power to punish and pardon unrestricted by rules . . . .[315]

Truth always advances, but at times, haltingly.[316]

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[314] By diligent hard work, Martin Luther's father became leaseholder and operator of a copper mine in the Mansfeld mining district of Saxony. Having risen from the peasantry to success, he had high ambitions for his son: he was determined to see Martin ascend to civil service as a lawyer and bring further honor to the family. At his father's insistence, Martin left home and began study of the civil law at the University of Erfurt. A shot time later, while traveling, Martin became terrified when a lightening bolt came within a hair's breadth of striking him, killing his traveling companion. Death's close call brought Martin into abject fear of punishment for his sins, drove him to quit his law study, and to seek admission into the Augustinian order as a monk. Martin's choice disappointed his father.

[315] MERRYMAN, *supra* note 82, at 128.

[316] God's Word captured and bound Martin Luther to the single desire of advancing the gospel of God. Many of those influential persons supporting Luther, however, doubtless saw his influence with the Christian world as a boost to their purely political goals of nationalism and personal power. In turn, Luther saw nationalism as a boon to advance the gospel by freeing Saxony from yoke of Rome's doctrine. Nonetheless, Luther's willingness to recommend that German princes use civil-law prerogatives to advance nationalist goals entrenched civil-law ideals in Germany that proved destructive even into the twentieth century.

Because England was a common-law country, the craving of Henry VIII. for absolute power turned out different there than it did in the Germany. Henry's break with Rome and merger of the Crown's sovereignty in Parliament during the sixteenth century enabled Parliament's break with the divine-right-of-kings doctrine during the seventeenth century. William Tyndale, it seems for the same reason as Luther, supported absolute monarchy (the divine right of kings). "He that judgeth the King," wrote Tyndale in *Obedience of a Christian Man*, "judgeth God and dameth God's law and ordinance . . . the King is, in this world, without law; and may at his lust [pleasure] do right or wrong, and shall give account to God alone." DICKENS, THE ENGLISH REFORMATION 73 (n.d.) *quoted in* BENSON BOBRICK, WIDE AS THE WATERS 122 (2002). See generally §§ 3.8.1–3.8.2 of this book (discussing the civil law's divine-right-of-kings theory).

Possibly, Tyndale's error in accepting the doctrine of absolute kingship influenced his confusion of the terms for *authority* and *power* in his translation of *Romans* 13:1–7. See

§ 2.8.1
Holy Roman Empire

The power of the Roman Empire was great, but it had the forces of decay within and was doomed to be eclipsed . . . Charlemagne was the first effort [*to give life to its ghost*]. *The Holy Roman Empire (which, as Lord Bryce pointed out was neither holy, Roman nor an empire) put its dwarfish self into the giant toga of the Caesars, but the misfit was obvious . . . Charles the V of Spain, Napoleon, Kaiser Wilhelm, Hitler . . . .*[317]

Lord Bryce indeed stated aright that the Holy Roman Empire was neither holy nor an empire; but he errs in stating it was not Roman, at least in one sense: it was Roman in that it used Rome's civil law. On Christmas Day A.D. 800, Charles the Great (Charlemagne), King of Franks, became emperor of the Holy Roman Empire. Charlemagne's chief advisor was Alcuin: an Anglo-Saxon churchman from England and familiar with common-law principles. Alcuin's influence, however, was limited. Following Charlemagne and until 1806, a succession of princes ruled various parts of the continent, many holding the title *Holy Roman Emperor*.

Over time, this purported empire weakened until it fell into a loose confederation of about 300 German provinces, allowing so-called emperors to exercise power only when the princes of these provinces backed him.[318] Because the old Roman Empire had failed, in the height of its power, to conquer the northern portions of this confederation, the civil law never dominated the Germanic tribes of those parts until after

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generally app. 18 of this book (discussing the phrase *the powers that be* and its present-day familiar use through William Tyndale's translation of *Romans* 13:1–7). See*, e.g., Luke* 10:19, where Tyndale's translation and the King James Version has "power" for both *εξουσια* (*eksee-ousia*: authority) and *δυναμις* (*dunamis*: potency). *See further* 1 *Corinthians* 9:4, 5, 12. *But see* SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 172–75 (photo. reprint 1982) (1644).

[317] DONALD GREY BARNHOUSE, THE INVISIBLE War 239–40 (1965).

[318] Diffusion of political power among the confederated German states was instrumental in sparing Martin Luther's life and in allowing the Protestant Reformation to persist in Germany—enough of the heads (electors) of these loosely confederated states chose to back Luther in his contention with Rome. Consequently, the German *emperor*—the writer, in this context, uses the term loosely—was less vicious than was Rome toward the reformers and their ideals. Contrary to his later arguments, Martin Luther, by appealing to the same civil-law doctrines Rome claimed, encouraged German nationalism as an aid to the Reformation in Germany. Maybe it was Luther's personality to fight fire with fire. For whatever reason, he chose to advance civil-law theories of government and to ignore the customary laws of Saxony that the Anglo-Saxons had first carried to Britain over 1000 years earlier and that Eike von Repgau, the continental Saxon lawyer, had compiled as the *Sachsenspiegel* (Mirror of the Saxon Law) in 1320.

1600. Thus, before that time, in utility, the Holy Roman Empire functioned as the United Nations: empowered to act only to the degree its members decided to take part.

§ 2.8.2
The Imperial Church Claims Justinian's Code

The pry bar of Roman law found its fulcrum on the hill of the Vatican.[319]

In 1073, at age fifty, Gregory VII became bishop of Rome. Hankering to seat himself firmly on the imperial throne, for years Gregory had eagerly worked Rome's political system. After his coronation, Gregory declared the goals driving his zeal: papal power over the entire earth and every aspect of human life thereon. To achieve his goals, however, he needed a legal code acceptable as final authority for his plans of far-flung and all-embracing domination, temporal and spiritual, of all peoples, institutions, and governments. Thus, for Gregory's purposes, such a code needed to confirm his position as supreme emperor (*imperator* or commanding one) on earth in the place of God.[320]

Never bashful, Gregory issued his declaration, demanding that all other princes must kiss his foot alone and that in the churches all other men must recite his name alone. He further claimed for himself alone the following powers: to depose all other emperors, to revise his own decrees and judgments, to determine what writings are canonical, and to make new laws that in his sole judgment meet the needs of the times for all men. In December of 1075, Gregory VII published these and other declarations in a manifesto of twenty-seven dogmas,[321] terse and unsupported. The claims of twentieth-century tyrants pale by comparison—in geographic reach if nothing else. Nevertheless, Gregory's claims of prerogative are comparable to the usurpations of men such as Nimrod, the Egyptian pharaohs, Alexander the Great, Nebuchadnezzär, and former Roman emperors. As did Gregory VII, these tyrants claimed

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[319] *See* DONALD GREY BARNHOUSE, THE INVISIBLE WAR 239–40 (1965).

[320] Hence the Latin title "Vicar of Christ"—*vicar* meaning "in [the] place of." In the first-century Roman Empire, the *Koiné* Greek equivalent of *vicar* was *αντι* (*anti*). See generally §§ 3.8.1–3.8.2 of this book (discussing the divine-right-of-kings theory, John the apostle's reference to it, and the common law's aversion to it).

[321] *Dogma*, a Greek civil-law term, is an unappealable and impersonal command, given under threat of force. See generally § 5.1.7 of this book (discussing the civil-law technical term *dogma*, with examples of its use from the ancient world and Scripture).

jurisdiction over all that is in the world, including power over men's consciences.[322]

Pope Gregory had been brazen in setting forth his manifesto.[323] The used path of a hopeful tyrant to dictatorial power is through political intrigue; only after gaining his power—and thereby securing his position—does he reveal his real cravings. Gregory VII, however, took the less-trod path of Julius Cæsar and came at his ambition from the other end: he first declared his power and then secured it by political intrigue. Integral to his intrigue, the second step in his plan was the surfacing of Justinian's Code. In 1082, about eight years after Gregory published his papal manifesto, a single copy of the forgotten Pandects[324] of Justinian, constituting the heart of the *Code of Justinian*, turned up in a library at Florence, Italy. The Roman priesthood's veneration of Justinian's Code as the *incarnation* or embodiment of pure reason followed this discovery.

In the Code, now dug from obscurity, Gregory had support for his absolutist claims as supreme *pontifex maximus* over all the earth and her

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[322] See KARL HOFMANN, DER DICATUS PAPAE GREGORS VII 11 (Paderborn 1933), for the Latin text of *Dictatus Papae*. See S.Z. EHLER AND J.B. MORRALL, CHURCH AND STATE THROUGH THE CENTURIES 43–44 (London 1954), for an English translation, *reproduced in* TIERNEY, CRISIS OF CHURCH AND STATE 49–50 (n.d.), *discussed in* BERMAN, *supra* note 9, at 94–96.

[323] Peter Damian, Gregory's aid in his struggle for papal supremacy, addressed Gregory, "*my holy Satan*" and wrote to him, "Thy *will* has always been a command to me—*evil but lawful.*" ORVILLE PRESCOTT, LORDS OF ITALY: PORTRAITS FROM THE MIDDLE AGES 43 (1972) (emphasis added), *quoted in id.* at 94. Even if Damian's obedience to his leader was evil (lawless), the principles of civil law, by fiction, deem such obedience lawful.

Gregory VII had the brass of a Kansas City fire engine. Scripture's description of a person as *brassy* carries overtones of evil and judgment. Scripture's first use of "brassy" in *Genesis* 3:1 describes Satan: "Now Satan [*nacash*: "Brassy"] was more-disgraceful [ערום (*a-roam*): unassuming *yet* nefarious] than any living creature of the field that the LORD God had made." Though a common Old Testament Hebrew designation for *Satan* (שטן: *satan*) is "adversary," *Genesis* 3:1 titles him נחש (*nacash*): "Brassy [one]." *Nacash* also means "brazen," signifying those things made of brass: an alloy of copper and tin or an alloy of copper. Both the Hebrew *nacash* and its translation "brassy" or "brazen" often imply a lack of shame. For example, *Genesis* chapter three closes: "Both the man and his wife were naked, but were *lacked shame each toward the other*." The Hebrew for "lacked shame each toward the other" is יתבששו (*yi-thabo-sha-shue*), a Hebrew Hithpael verb stem: reciprocal form of בשן (*bashan*), a Hebrew double negative, "not unacceptable," i.e., Adam and Eve each were accepting (acceptable and accepting) each of themselves and each of the other. They were *reciprocally gracious*. Intending contrast, *Genesis* chapter three follows hard with, "Now the serpent ["Brassy"] was more-disgraceful [*a-roam*] than all . . . ." Gregory VII displayed this kind of disgraceful (unacceptable) *brass*. Herman Melville calls the serpent in the Garden of Eden *urbane*.

[324] Modern civil law retains Justinian's Pandects (Greek, *πανδεκτες:* meaning an all-receiving or all-inclusive book), spelt *Pandekt* in the German version of Justinian's Code. Also called the *Digests*, the Pandects are the heart of the Roman civil law "consisting in the opinions and writings of eminent lawyers, digested in a systematical method." 1 BLACKSTONE, *supra* note 12, at 17 n.*u*.

inhabitants. Heralding the purported discovery of Justinian's long-lost Code, Gregory relied upon it to support his ambitions, promoting the Code as the inspired embodiment of perfected reason, revealing the ancient secrets of the old Roman Empire's power.

Having pressed the *Code of Justinian* into his service, Gregory VII set about to give it fresh characterization and thereby assure its veneration and expand its influence. It was no coincidence that within only about five years after the *Code of Justinian* turned up in Florence, Rome commissioned the first university in Europe at Bologna (founded 1088)[325] and devoted it to preserving the interpretations of Justinian's Code that justified Rome's power. More to the crux of the matter, the purpose of the university at Bologna was to bring all disciplines of science and learning into conformity with that Code.[326] By so doing, Rome intended this university to provide a constant stream of lawyer-priests to support the Roman pontiffs' realization and retention of the universal powers that Gregory had claimed.

As had the sons of Rome's founding families—when centuries before they attended the Babylonian institutions of the Etruscans—, students soon flocked from all of Europe to learn and understand the supposed secret power of the long-lost civil law:[327]

> It was highly convenient, and *not wholly accidental*, that a manuscript of Justinian's Digest turned up in a library in Florence in the 1080's and it was *surely not accidental* that

[325] After Justinian conquered Italy in A.D. 544, he established a law school in Rome. It was not, however, a *university* in the sense of the school Gregory VII later established at Bologna, including those universities Rome established following the Bologna model: devoted to universal integration of all disciplines under Justinian's Code as the single unifying standard to which all other disciplines of learning must conform. The scholastics followed the Greeks in their quest for a standard whereby to unify apparent diversity and multiversity; the civil-law Code became Rome's unifying standard. The university was the institution fashioned to focus all understanding upon that Code's provisions, venerated as the quintessence of reason.

[326] Founded upon Justinian's Code in the city of Bologna in 1088, the University of Bologna was the world's first and is the oldest continually operating degree-granting university in the world. Its historic notability is the teaching of canon and civil law. Since the year 2000, its motto—*Alma mater studiorum* (fostering mother of studies)—alludes to its historic purpose: the civil law's domination of all other academic disciplines. Thus, allowing only the civil law and Scholasticism, its ever attending handmaiden, to give meaning to any and all facts known and discovered. See generally § 5.1.9 of this book (discussing the university as Rome's tool for advancement of her civil law and discussing common law's inroads into both Oxford and Cambridge Universities).

[327] See generally § 2.3 of this book (briefly discussing the Etruscan culture's academic institutions and their influence of organized Babylonian thought and methods into Roman religion, law, and government).

> very soon a university was founded at Bologna—the first European university—to study that manuscript . . . a *ratio scripta* [reason written], as the Roman law was then called . . . It was as though the Old Testament had suddenly been discovered for the first time by Christian theologians.[328]

Then, in 1133, during the war of the Holy Roman Emperor, Lothair, against the Norman king of Sicily Roger II, Lothair sacked Amalfi, twenty-four miles southwest of Naples, and found there another copy of the Pandicts of Justinian:

> A copy of Justinian's pandects, being newly discovered at Amalfi, soon brought the civil law into vogue all over the west of Europe, where before . . . it was in a manner forgotten [though not in] the eastern provinces of the empire. [It] . . . became . . .the favorite of the popish clergy.[329]

This second discovery of the Justinian's Pandects, "concurring with the policy of the Romish ecclesiastics, suddenly gave new vogue and authority to the civil law, [and] introduced it into several nations."[330] Moreover, "the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal."[331]

The year A.D. 476 saw the last of the Western emperors; after which Germanic chieftains filled the power vacuum in Rome. Nevertheless, a mystique about Rome and her empire held sway over the minds of Justinian's jurists as they resurrected the study of the Roman civil law. Did they crave the pagan spirit of Rome's usurped glory; did they believe, as many ambitious tyrants have believed since, that the spirit of Rome lives on in her civil law? For centuries, princes of church and state have cherished the idea of ruling in the traditional power of the Roman cæsars. In any case—this is the controlling point—Justinian's jurists received the *Code of Justinian* as the perfected expression of truth in the same way that the Apostles and the Puritan divines received the Bible as perfected truth. As the Hebrews venerated the Word of God written, these civil-law jurists set forth Justinian's Code as the final rule of faith and practice for all persons in all times and places:

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[328] BERMAN, *supra* note 9, at 528 (emphasis added).
[329] 1 BLACKSTONE, *supra* note 12, at 18.
[330] *Id.* at 81.
[331] *Id.* at 18.

> Moreover, Tuscany and Normandy themselves were thought to be the continuation of Rome, just as the Church, or Christendom, was thought to be the continuation of Israel. The discovery in about 1080 of a copy of Justinian's compilation was received in the same spirit as that in which a discovery of a copy of a long lost supplement to the Old Testament might have been received.[332]

Soon Europe received Justinian's Code in the spirit of Rome as though divinely given by Babylon's goddess of reason, whose embodiment it purported to present. It was in the spirit of this same civil law that the French Revolutionaries, in the wake of their reign of terror, enshrined the goddess of reason upon the steps of Notre Dame Cathedral. The devotees of the civil-law Code believed it to be reason's unveiling of *herself*. By contrast, the Scriptures are God's revelation of His mind, will, and love.

Following the discoveries of Justinian's Code and the founding of the university at Bologna, the Roman Church established other universities to propagate Rome's view of Justinian's Code as ultimate. "The rise of universities and Scholasticism," writes Cairns, "strengthened the intellectual foundations of papal power."[333] The text of this Code was their object of devotion, "Indeed," says Berman, "it is likely that the law school [at Bologna] was founded primarily for the purpose of studying *that* text."[334] Increasingly conscious of their method, the professors and their students at Bologna—priests, civilians, and judges—confined their consideration to the text of the Code alone; from it they judged al else. This tradition has persisted among civil-law jurists (civilians). Beginning with Bologna, Rome's universities reattached the dignity of the former ages of Rome's empire to the civil law's old doctrines.

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[332] *Id.* at 122–23. Knappen calls the subsequent swell of veneration for Justinian's Code as "the cult of the Roman civil law . . . ." M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 207 (1942). As a practical matter of legal method, civil lawyers continue to approach civil-law tradition—Justinian's Code understood in light of the scholastic method—in like veneration.

[333] EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 227 (1979) (capital letters in original).

[334] BERMAN, *supra* note 9, at 127 (emphasis added). Rome further unified and protected her university system from outside influences by requiring the exclusive use of Latin among professors, students, and the priesthood, especially in the conduct of priestcraft and even statecraft. Following the founding of Rome's first university at Bologna, this requirement of Latin persisted for centuries. Knowledge of Latin is good because it enhances precise use of English; but the use of Latin as a tool of scholastic priestcraft to conceal truth is evil.

By the early twelfth century, the civilian jurist had mostly developed his methods. Foundered in adoration of Greek reason, this method presupposed the absolute authority of the text of Justinian's Code, while excusing gaps and contradictions. Excusing such inconsistencies, however, is akin to the attitude that desires to reverence the Scriptures as the Word of God, while presuming that its autographs are imperfect.[335] Civil-law jurists accepted Justinian's Code as perfected in the sense of no longer *becoming*[336] or capable of improvement. Rome, therefore, used Justinian's Code as the measuring rod against which the validity of all other laws and legal systems are tested.

In uncanny superstition, the Code's devotees held it in place of the Bible: without error and therefore universally applicable:

> Their can be no stronger instance of the absurd and superstitious veneration that was paid these laws [Rome's civil laws], than that the most learned writers of the times thought that they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist.[337]

In addition, Justinian's Code was municipal law; the Romans called it *ius civile*. "Etymologically *ius civile* denotes the law of a given *civitas* or citizens [those belonging to a city]."[338] The civil law is urban law from the city of Rome, by the city of Rome, for the city of Rome, and tailored to the

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[335] See generally § 4.1.3.1 of this book (comparing and contrasting the doctrine of the perfection of God's Word the doctrine of the perfection of Justinian's Code).

[336] *See* BERMAN, *supra* note 9, at 131. One rightly attributes such completeness and certainty—in word, *perfectness*—only to the majesty of God's Word. The Scriptures are ample to bring the man of God into perfected standing, and to equip him aplenty unto all lawfulness ("good deeds"). *See* 2 *Timothy* 3:16. In order to build one's confidence in this reality, Peter the apostle declares the Scriptures more certain than the audible voice of God, which Peter heard out of heaven, during his eyewitness of Christ's transfiguration. *See* 1 *Peter* 1:23; 2 *Timothy* 3:16–17; 2 *Peter* 1:16–21 *and esp*. verse 19.

In contrast with the civil lawyer, the traditional common lawyer begins consideration of each case acknowledging that the court is possibly ignorant of the law of the case and its true application. He believes, however, that if he pursues the common law's procedure of discovery of law and fact (due process), the court stands the best opportunity of uncovering the truth, which then enables discernment of the facts and the mind of God concerning the applicable law and the fitting application of that law.

[337] 1 BLACKSTONE, *supra* note 12, at 21, *citing* ALBERTUS MAGNUS, SUMMA DE LAUDIBUS CHRISTIFERAE VIRGINIS (*divinum magis quam humanum opus*) qu. 23. § 5. *Citing also*, BERNARDINUSDE BUSTI, MARIALE, pt. 4, serm. 9. A canonist is a kind of civilian; both are called Romanist.

[338] BERGER, *supra* note 236, at 527.

citizens of Rome. It was, and remains, as Roman jurists called it, the *ius civile proprium Romanorum* (law particular to Roman citizens).

Civil law, therefore, is an urban law tailored to a particular city (Rome), held forth to be the incarnation of the timeless principles of reason,[339] and all that is needed to judge man's behavior at all times and in all places. Gregory's claim to rule the world from Rome was in furtherance of his attempt to imitate Rome's emperors. Rome was a *city* that ruled her empire from Rome, by Romans. Rome was not even a country that ruled an empire, such as did England in ruling the British Empire.[340] Suckled on Babylonian religion, the civil-law tradition matured in Roman power, where the emperors executed Rome's will by sheer might—not always because she was right.

Cities have been largely cultures of consumption of raw materials; rural areas, on the other hand, have been largely cultures of production of raw materials.[341] Herein lies an observation from the scattering that occurred at Babylon: in the false religion of human will, Babylon conceived civil law and government, which then became the law of the city of Rome, was compiled as Justinian's Code, and is now received as the law of many nations.[342] God, however, never desired men to govern the earth by human standards, fashioned to execute man's will from cities of men; instead, He intends His standards to govern the earth from the city of God.

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[339] See generally app. 12 of this book (discussing humanism and the effect of John Calvin's training to become a civilian upon his view of law and government).

[340] Though England herself was a common-law country, she gave little credence to common law in the countries under her rule. However, her attempts to deny common-law rights in her American Colonies—such as the right to trial by jury, the right to keep and bear arms, and the right to freedom from lawless searches and seizures—through wrongful use of civil law's admiralty powers caused her loss of those Colonies. See generally §§ 3.10.3–3.10.6 of this book (discussing Parliament's denial of the American colonials' rights).

[341] This fundamental distinction between urban and rural life now forms the political dividing line in the United States. The last two presidential elections show a sharp division between the urban population and rural folk. In the election of 2000, over 80% of the geographic area of the country carried one candidate; the remaining urban areas carried the other. See generally § 2.4 of this book (discussing Rome's reduplication of cities as a strategy to extend urban control over vast rural areas of her empire).

[342] Using her false doctrines of religion and false law and government arising therefrom, Babylon has seduced the leaders of many nations. From this fornication of seductive doctrine flows fitly lucre: dishonest material gain. See, *e.g.*, *Titus* 1:7, 11; 1 *Peter* 5:2, where the apostles both identify the opportunity of dishonest gain in the teaching of false doctrine of law. See generally app. 28 of this book (discussing, in light of John the Revelator's vision, Babylon's seduction of nations using Babylonian civil religion, law, and government).

§ 2.8.3
Canon Law:
Civil Law for the Imperial Church

[T]he canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.[343]

In medieval Europe, the Roman Church was powerful; she commanded nations. To ascend her structures of power, a doctor's degree in the twin sisters of either scholastic theology or civil and canon laws was necessary. Both courses of study—scholastic theology and civil law—concerned the same worldview, tradition, and subject matter. A doctor of theology degree, however, required twenty years to obtain and took its candidates to a level of sophistication unobtainable in the seven years required for a doctor's degree of the civil and canon laws. The doctor of the civil and canon laws degree signified a scholar; the doctor of theology degree denoted the scholar of scholars. The Roman church has accorded to her medieval doctors of theology the stature of those of the early Church called *fathers*.

By the time the doctor of theology candidate received his degree and began his career, he was older than the man that had pursued the doctor of civil and canon laws, by at least thirteen years. Thus, a doctor's degree in the canon and civil laws allowed more time for an active career in church-state politics. Consequently, many of Rome's politically ambitious priests—some of whom became cardinals and popes—opted to become lawyers of the civil and canon laws instead of scholastic doctors.

The recipients of both degrees became Rome's well-trained lawyer-priests focused on the civil and canon laws only, thus bringing through the centuries two results. *First*, Rome's lawyer-priests have taken for authority the civil and canon-law codes in place of the Scriptures. *Second*, Rome's scholastic doctors have welded the temporal and spiritual powers of these two codes into a single state and justified that state as *total*. Rome's universities trained her lawyer-priests to habituate their loyalty and minds to the Greek tradition—in the middle ages called scholasticism[344]—as applied to Justinian's Code.

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[343] 1 BLACKSTONE, *supra* note 12, at 59. *Rescripts* were an emperor's judicial interpretations and applications of his own legislation provided upon request to parties in legal disputes.

[344] "The terms 'scholastic' and 'scholasticism' came into English through the Latin from the Greek *schōle*, which signified a place where learning went on." EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 251 (1979). Charlemagne's court and palace school

The Roman civil and canon law are two applications of the same essential code in two mutually dependent civil-law arenas: the civil-law Code for the state's temporal tribunals and the canon-law Code for the state's ecclesiastic tribunals. The civil-law tradition has forged both codes together in mutual dependence, forming a single body of law. The Roman emperor depended on the imperial pope's divine commission, according to the canon-law Code, for justification of his civil-law Code and the power it claimed to give to the emperor; in return, the imperial pope demanded tribute and military power from the Roman emperor, according to the prerogatives of the civil-law Code. "Roman civil law," says Merryman, "was the universal law of the temporal empire, directly associated with the authority of the emperor, so the canon law was the universal law of the spiritual domain, directly associated with the authority of the pope."[345] In A.D. 529, five years after the enactment of Justinian's Code, a revised version called *Codex Repetitae Praelectionis* replaced it. Also called Justinian's Code, it covered canon law, private law, and criminal law.

Thus, the Roman civil law and the canon law operated hand-in-hand as common images of the common will of a common power—temporal and ecclesiastic—together reciprocally supporting the imperial state. Though the labels differed early on, the civil and canon law were, and remain, the same in essence. Then in 1583, Rome changed the labels to make the twin codes alike in name also and to reinforce the public

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applied the term *scholastic* to scholars who used human philosophy. Scholasticism founds its theology upon the method and viewpoint of Aristotle (Greek philosophy and reasoning) instead of upon Scripture. *See id.* Scholasticism entered Western Europe from Jewish and Arabic sources using translations of Aristotle: the famous Jewish rabbi Moses Maimonides produced translations that entered Europe at Paris; the Arabic philosopher Averoos produced translations that entered Europe through Spain. *See id.* at 252. Rome's newly established mendicant orders made Rome's expanding university movement a home for this fusion of Hellenized thought to its media of Jewish and Moorish culture.

The purpose of scholasticism was to justify the power of an already established political-religious state by rationalizing its power. Scholasticism, therefore, seeks not to discover truth but to affirm the status quo; the content and method of scholasticism remains fixed. Because scholasticism seeks to affirm that which *is* (the powers that *be*), it fails to move principles of law and government toward that which these ought to be. Scholasticism seeks to wed truth to the combined pagan Greek thought of Aristotle, the Talmudic rabbis, and the Hadith of the Moors: an impossible unity. *Id.* at 253.

By the latter half of the second century A.D., the title *father* had begun its attachment to church leaders as though they succeeded to the dignity of those designated *apostle*. Then, after 1050, Gregory VII's resurrection of Justinian's Code and initiation of Rome's university movement, the scholastics succeeded to the dignity attributed to the title *father* with the title *doctor*. "Doctor" remains a title of honor in those institutions maintaining the spirit of scholasticism: the world's universities. *See generally id.* at 251–62 (discussing the development of scholasticism between 1050 and 1350).

[345] MERRYMAN, *supra* note 82, at 11.

perception of state solidarity: Justinian's Code became *Corpus Juris Civilis* (body of civil law) in order to resemble the *Corpus Juris Canonci* (body of canon law). Thus, *Corpus Juris Civilis* was the name given to Justinian's Code in the year 1582. The foundations of *Corpus Juris Civilis*, however, predate its promulgation, reaching back to the settlement of Babylon (*c.* 2350 B.C.).[346]

The name *Corpus Juris Civilis* came about, when, in response to the threat of Magna Carta's final issue of 1225, the imperial Roman Church compiled its civil-law Code and named it *Corpus Juris Canonci* (body of canon law). Then, to further fix in men's minds the power of Roman religion with that of the Roman state, Rome proclaimed the shared essence of the two codes, renaming Justinian's Code with *Corpus Juris Civilis* (body of civil law), corresponding to *Corpus Juris Canonci* (body of canon law).

Because both Codes used the same controlling civil-law principles, concepts, and terminology, the imperial church and all Europe called these two codes together *jus commune*. Yet today in some civil-law countries, because the source, ideals, and methods of the Roman Church's canon law and the Roman state's civil law are homogenous, the academic degree conferred on Roman civil lawyers embraces both Rome's civil and canon law: *Juris Utriusque* (Doctor of Both Laws). Even those today holding one of the modern twin degrees, Bachelor of Canon Law or Bachelor of Civil Law, both designate their degree with the letters B.C.L., thus the two remain indistinguishable not only in essence but also in name.

Using the double tools of civil and canon law, aggressive popes attempted to reduce the emerging European states[347]—and also England—to vassalage by substituting local law with civil law, by any opportunity and all means, in the form of Justinian's *Corpus Juris Civilis* and its twin *Corpus Juris Canonci*. To this end, Rome established in England Abington Monastery and devoted it to indoctrinating priests in Rome's civil law, who then were to seek appointment to judgeships in England's courts and supplant the common law. Rome's power over

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[346] See generally § 2.1 of this book (discussing the conception of Babylon in the tradition of civil law and government).

[347] In that day, the emerging European countries further justified their independence from Roman tribute by calling themselves *natural states*, that is, founding their right on divine authority through nature, rather than through the civil-law Code. This idea then found its way into our Declaration of Independence. *See* THE DECLARATION OF INDEPENDENCE paras. 1, 32 (U.S. 1776), where the subscribers appeal for justification of the independence of the United States to the laws of nature and nature's God.

England, including her potential to extract revenues in the form of tribute, depended upon Rome's success at Abington Monastery.

In summation, Rome's civil and canon-law Codes are the two expressions of the single body of law labeled *Roman civil law*. Throughout Europe, both the ecclesiastic and civil tribunals enfolded both codes into justification of the *powers that be*.[348] Over time, the scholars recognized this joining as one universally applicable *jus commune*: an abbreviated form of *jus commune omnium hominum* (law applicable to the whole of mankind), distinguished from the civil law's *ius singular* or *privilegium* (the particular law of privilege). Some civil-law states still recognize the *jus commune* to be a single body of law. All civil-law tribunals and nations tend toward such overlapping because the Roman civil and canon law are alike in purpose and even in particulars. A nation's use of *jus commune* shows that the civil-law and canon-law Codes function in concert to support the imperial church and state as one. "This Roman civil law-canon law *jus commune*," says Merryman, "was the generally applicable law of [continental] Europe."[349]

§ 2.9
Russia

A totalitarian state aims at total politicization of a nation. For the mind subdued by politics—as also the mind subdued by show business and entertainment—, perception of the mediating state is reality; the medium, said Marshall McCluun, having eclipsed reality, becomes the message.

The events in the sweep and flow of history, leading to Russia's reception of Roman civil law, helps one understand Russia's more-recent history. The fifteenth-century imperial Russian family understood their reception of Roman civil law to be the continuation of Rome's empire. Russia's civil law and government has resulted from happenings traceable in history.

On 11 May A.D. 330, Constantine I moved the capitol of the Roman Empire from Rome to Byzantium in Asia Minor—a radical move. At first, he called the city New Rome; later, the world called it Constantinople, now Istanbul of modern Turkey. The emperors in New Rome, being nearer the influences of Babylon's eastern and mystic brand of priestcraft-statecraft, rarely appeared in public; but when they did, they

[348] See generally app. 18 of this book (discussing the meaning of William Tyndale's phrase the *powers that be*).

[349] *Id.*

evermore used the ancient Babylonian and Persian rulers' ornate regalia, combining statecraft with priestcraft.

For example, emperors sat on a golden throne suspended by thin wires in midair, giving the appearance of godhood: as though hovering between heaven and earth, and mediating between the two realms. Other tricks of magic hoodwinked the populace into awe and false worship of the state.[350] After Christianity became the state religion, the emperors were unable to successfully claim absolute divinity. Each one, instead, called himself the thirteenth apostle[351] and claimed God's imperial power on earth.

The Western Roman Empire had continued to enlarge until A.D. 180, when it suffered unending barbarian (Germanic) attacks. Control of its vast frontiers became impossible from the single capital city of Rome; thus, the empire split into two parts: eastern and western. Nevertheless, the threat of the Germanic tribesgrew, forcing Rome to withdraw her legions from Britain in order to defend her frontiers; but all was in vain. In A.D. 407, Germanic tribes (Visagoths) sacked Rome; by 476, a Germanic chieftain controlled the city. Though called a barbarian, this chieftain was more literate in Latin culture than were most of the Roman rulers. Then, in A.D. 536, The Romans rallied and routed the Germanic

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[350] Where a nation arrogates to its religious and political leaders a semi-deified status, political trickery multiplies. Examples abound from the magicians of ancient Egypt to the magical Madonnas of Europe and Latin America. *See, e.g., Genesis* 41:8, *Exodus* 7:11. Common to both of these afore-cited verses is the term חרטם (*caretome*). Unlike most Semitic words, which are trilateral, *caretome* has four letters and is likely a loan word from the Egyptians. It signifies a variety of occultist practices and appears in the Aramaic section of *Daniel*, denoting the Babylonian magicians. In addition, by placing *caretome* in parallel literary structure to sorcerers and soothsayers, Daniel equates *caretom* to them both. *See Daniel* 2:2, 2:27. According to André Kole, at least 95% of all claimed supernatural phenomena are mere tricks, using natural means. Lecture, Biola Univ., La Mirada, California, Mar. 1984. *See also generally* ANDRÉ KOLE, MIRACLES OR MAGIC (1987) (providing wisdom for discerning the supernatural, or miracles, from the natural, or tricks of the trade of magic).

[351] In the Eastern Empire, the emperors held themselves out as *equal with Christ*: standing in Christ's place, fulfilling Christ's office on earth and, in some instances, on earth and in heaven, by claiming jurisdiction over the temporal and the eternal realms. The comparable Greek phrase is *αντι χριστος* (*anti christos*: antichrist), a prepositional phrase with *αντι* (*anti*), meaning "equal to," "instead of," or "in place of," and stemming from *αμφι* (*amphi*), meaning "both sides"—as though standing opposite, in the sense of a mirror image or *an equal*—and *χριστος* (*Christos*), meaning "Christ."

The Western Empire used the equivalent title *Vicar of Christ*. See generally 1 *John* 2:18, 22; 4:3; 2 *John* 7, where John uses the equivalent Greek phrase (*αντι χριστος: anti christos*, English, "antichrist") in the same sense, signifying *in the place of* and "equal to," but not foremost "against"—although to claim equality with Christ is to be against Christ. It was in the foregoing sense that John Knox, in his first sermon at St. Andrew's Castle in the spring of 1547, used the title *antichrist* to signify the Roman pope.

tribesmen and again took possession of Italy. By A.D. 755, however, Rome had lost control over her Eastern Empire; after that, any power left in Rome was in the bishop of Rome alone, who held unbroken rule over central Italy and fluctuating power over other parts of central Europe until 1870. In brief, the bishops of Rome (popes) became the successors to the Roman emperors' throne in the West.

In the West, the barbarian invasion had been near complete: they sacked, shrank, and then carved up Rome's Western Empire. The Eastern Empire survived over 8000 years more, continuing to fill the power vacuum in that region. Over time, however, the Eastern Empire also shrank until it ruled only the city of Constantinople. Then, in 1453, an army of 150,000 Turks surrounded the city, which commanded fewer than 8000 soldiers.

Her fortifications, however, were great: rings of walls and battlements, extending nearly 200 feet from the city's outer to her inner wall, surrounded her. Moreover, a moat thirty feet deep and sixty feet wide encircled the outer wall. Thus, Constantinople withstood the Turks' siege for seven weeks. The Turks then obtained a terrifying weapon: a large brass canon that fired a 1200-pound projectile.[352] With this, and many smaller canons, the Turks breached the city walls. Upon learning this news, Emperor Constantine XI dressed, attended mass, donned his armor, and went to the breach, to the thick of the fight. He likely died in battle, but neither his subjects nor his enemies ever identified his body.

While Constantinople's fall on 30 May 1453 marked the end of one aspect of the greatest empire the world had seen up to that time, it began deeper penetrations and wider broadcasting of Rome's civil law and government. In a word, the force of the blow bringing Constantinople's fall scattered Rome's civil law into Asia and Europe. More to the reason for the conflict, however, it triggered a steady broadcasting of two antagonistic collections of documents: the New Testament manuscripts in their original Greek and the manuscripts of Justinian's Code, also first written in Greek.

In time, the Greek New Testament manuscripts[353] proved to be match-like, igniting flames in the dry, lifeless timber of England's

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[352] The Turks developed this massive canon with the aid of Urban Getties, turncoat scientist from New Rome. Such technology still unperfected, it exploded during the siege.

[353] Though Erasmus was unintending, by compiling and publishing the Greek New Testament (*Textus Receptus*) in 1516, 1519, 1522, 1527, and 1535, he destroyed all possibility of Rome ever bringing England into its fold. "The publication of the Greek New Testament offered to any scholar acquainted with both languages a tool with which to criticize and correct the official Latin Bible of the [Roman] Church." BRUCE METZGER, THE TEXT OF THE NEW TESTAMENT 96 (1968). See generally THE NEW TESTAMENT, THE GREEK TEXT

priesthood; sparking conviction in others, thereby fortifying the common law. On the other hand, the manuscripts of Justinian's Code provided support for Rome's imperial ambitions over nations. In order to maintain her priestcraft and political power, Rome supplanted the Bible with Justinian's Code by founding her university system on the Code and organizing its colleges and curriculum around it. The dissemination of these two fundamentally incompatible sets of writings set the stage for definitive clashes of their ideals of law and government, beginning with the Reformation and culminating in the founding of the United States.

Babylonian in essence, Justinian's Code ratified and prepared Roman civil law for wide distribution, in name, as a *Christian* system of law and government. For example, beginning in the early Christian era, from Diocletian to culmination in Constantine, and continuing in those following, the Roman emperors became the sole source of statute law. The emperor was Rome, and Rome was the emperor; to faithful Romans, the law was truth, and the emperor was the law. Under the old Roman republic, though available, private law (law of private relationships) never developed; the judex and the *jurisconsult* were the only means by which law expanded or changed. Moreover, under civil law, praetors—magistrate judges with the power to dismiss cases filed—were servants of the emperor, not the people.[354] These civil-law fundamentals remained in place under Constantine and the Roman emperors following; though Constantine had stamped a Christian label on Roman law, the substance of the civil law's utopian ideals of the state's provision of legal certainty and personal security remained.

UNDERLYING THE ENGLISH AUTHORIZED VERSION OF 1611 (The Trinitarian Bible Society, London, Oxford Univ. Press, n.d.), for Erasmus's *Textus Receptus* (Received Text). See also generally THE GREEK NEW TESTAMENT ACCORDING TO THE MAJORITY TEXT (Zane C. Hodges & Arthur L. Farstad eds., Thomas Nelson 1982), for a recent compilation of Greek majority text manuscripts with the benefit of manuscript discoveries since Erasmus's day.

[354] Civil-law nations view their courts as tools of the state, not servants of the people. During President Martin Van Buren's administration, the monarch of Spain, in an attempt to sway the outcome of a case then pending in the American federal courts, once wrote President Van Buren asking, "How do you govern without control of *your* courts?" By contrast, during Daniel Webster's watch as Secretary of State, the State of New York indicted an English subject for murder. Because of common-law and constitutional independence of the judiciary, however, neither the President nor Webster meddled with the courts. Although the English were distraught over the indictment for other reasons, they did appreciate the executive's common-law lack of authority over federal and state judges.

The indictment concerned a Canadian under British military command killing an American operating a watercraft on the border between New York and Canada. The American killed had hired out his watercraft and piloting services to a sect of Canadians conducting armed insurrection against the English Crown. These two foregoing reactions of Spain and Britain reveal two distinct worldviews; each distinguished from the other by how each these two countries thought about law and government.

In 1453, following the death of emperor Constantine XI and Constantinople's fall, the emperor's family escaped to Moscow, where Constantine's niece wedded Russia's ruler. Moreover, he took as a wedding gift, the Roman emperor's crown jewels, which the Roman emperor's family had somehow smuggled out of Constantinople. By this marriage, Russia's ruler claimed the Roman emperor's official title *Cæsar*, bringing it into the Russian tongue as *Czar*—as also the Germans later did with *Kaiser*. Most important, Constantinople's ruling family brought Justinian's Code to Moscow.

In all of this, Moscow saw opportunity. Because of the marital union between these two royal families, Russia's ruling family capitalized on the perception that Russia was the unbroken continuation of Rome's empire, Rome's law, and Rome's glory.[355] Rome's civil law and government, now conveniently compiled as Justinian's Code, became the intellectual support for Russia to realize her ambition; Russia, therefore, adopted Justinian's Code.

In keeping with the spirit of revolution fostered in civil-law states, thereafter in Russia, the Czars' political opponents murdered over half of them. This country-crippling characteristic of the civil law has stayed with Russia. Consequently, since the fall of Constantinople—and even more so since Russia's revolution of 1917—, in an effort to keep order, the

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[355] Russia's claim to continuity with the Roman Empire was through the marriage of the last Byzantine emperor's *niece* to Ivan III, Grand Duke of Moscow. *See* Warren H. Carrol, *The Faith in Russian History* (visited 21 Aug. 2005) <www.catholic.com>. On the other hand, according to William Franklin Fratcher, the transfer of the Byzantine emperor's family jewels to the Russian ruling family and the marital connection between the Russian rulers and Rome's emperor was through a *daughter* of the last Roman emperor. In either event, there is agreement that a family tie attached the Roman emperors of Constantinople and Russia's ruling family:

> [I]n 1453, just as Russia was beginning to free itself at last from the Mongol domination, Constantinople and the remnant of the Byzantine empire fell to the Muslim Turks, who have ruled it ever since. Constantinople had been the "new Rome" when founded by Constantine the Great, the first Christian Roman Emperor, and until the end had proudly claimed that title. With the original Rome faded into incommunicable distance, and the second Rome seized by the infidel, the leaders of the Russian Church in the rising city of Moscow proclaimed their capitol to be the third Rome, heir to both the religious and the political authority of the forgotten first Rome and the captured second Rome . . . The [Roman] tradition of the Byzantine Church had included a strong element of "cæsaropapism"—control of the Church by the highest political authority, the Emperor. The emerging state of Muscovy adopted this [the Roman] system.

Id.

Russian government has ruled as had Rome: a government of one man, Diocletian-style.

Nowadays, centuries later, Russia's civil-law government has changed little. Its grand revolution of 1917, once touted with messianic fervor to be the beginning of a new age, is now seen for what it has always been: one of many revolts arising from Babylonish states. Not many years past, Americans, in their naive optimism, became excited over the prospects of democracy—whatever popular culture means by the word—in Russia, following the fall of the Soviet Union and Boris Yeltsin's rise to power. Americans stood befuddled, however, when Mr. Yeltsin, in stern, yet calm confidence, turned to the Russian legislature and suspended it until further notice, commanding that the doors of the parliamentary building be chained shut.[356]

Yet, to the Russian people, Yeltsin's imperial actions seemed neither shocking nor extraordinary. The Russians expected Yeltsin's heavy-handed applications of force, indeed, would have been surprised and amazed had Yeltsin forborne use of his power against his political opponents. In short, Russians were well aware of the chief-of-state's enormous power under civil law, having lived under it for generations. The civil-law tradition coupled with time had conditioned the Russian people to respect and accept raw power; most remain convinced that authority stems from power—instead of the other way around. Obedience to one's military superiors being the civil law's safe haven, the Russian military-officer corps also backed Yeltsin: the general officers gave direct loyalty to Yeltsin; the junior officers gave indirect loyalty to Yeltsin through their direct loyalty to their immediate military superiors. In any case, the individual officer's loyalty was neither to the assembly, nor to the majority, nor even to his country's Code, nor Godward to His standards of law.[357]

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[356] On 2 October 1993, Boris Yeltsin cleared the Russian parliament building of the entire Russian legislature, using tank artillery. Such methods of governance by force and threat of force stand in stark contrast to the common-law remedies for dismissing unwanted officials, such as impeachment and election.

[357] See generally § 4.6 of this book (discussing the biblical and common-law duty of each person to obey the law and not the government, where government commands in clear violation of law, whether in a military or non-military context; in the context of the war-crimes trials following World War II; and the Scripture's and common law's requirement of loyalty to law above any man or woman, or any combination thereof).

§ 2.10
Asia Minor & Greece

Following the fall of Constantinople, the Islamic Turks conquered most all of the eastern and southern Roman Empire. Then the Turks, having taken up the Roman law, conquered Christians and subjected them to it. In 1822, Greece reenacted the civil-law Code in the form of the *Basilica* of A.D. 888.[358] Then, following World War II, Greece replaced the *Basilica* with a modern civil Code that retains the *Basilica's* ideology.

§ 2.11
Italy, Spain & France

After A.D. 544, Justinian conquered the Italian peninsula and established a school of civil law at Rome; his law school, however, never gained much prestige or influence. Later, around 1080, following a purported rediscovery of Justinian's Code, Rome's pope Gregory VII founded the school of civil law at Bologna in 1088, which became preeminent for the study of Justinian's Code and has so remained ever since. Gregory arranged his law school as a university to reinforce and maintain, throughout the known world, two civil-law fundamentals underlying the total state: first, the public's perception that Justinian's Code is the compiled genius of the Roman Empire's success and incarnation of perfected reason; second, all disciplines of science must conform to that Code. To achieve these aims, Gregory arranged each of the other academic disciplines in separate colleges around Rome's Code and demanded that each discipline interpret its subject in unison with that Code. By this *university* arrangement, the civil lawyers (civilians), as official interpreters of that Code, were to control all other disciplines.[359]

Justinian's Code, the controlling and unifying core of Roman education, was also the foundation of Rome's modern university system, now spread worldwide. Because universities have taken abstract human

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[358] See generally § 2.7.5 of this book and accompanying notes, for discussion of the Greek term translated *kingdom*, *βασιλεια* (*basileia*: jurisdiction or the delegation to act concerning a given matter); its adjectival form, *βασιλικος* (*basilica*); and its significance in the phrase *βασιλικος νομος* (*basilica nomos*: imperial law, i.e., law that commands), in the Bible and in the Pergamum inscription. See also app. 15 of this book.

[359] See generally § 5.1.9 of this book (discussing the university as Rome's tool for advancement of her civil law and common law's inroads into both Oxford and Cambridge Universities). The modern university is Gregory VII's brainchild: a unified (*unus*) turning (*verses*) of every academic subject into unison with a single standard: Justinian's Code.

reason for their foundation, they have remained in the tradition of Babylon: the academic guardians of Greco-Roman scholasticism and of the humanists' effort to maintain the status quo in justification of the civil-law state.[360] After the year 1583, in order to magnify the fundamental commonness between the imperial church's *Corpus Juris Canonici* (the body of the canon law) and the imperial state's *Code of Justinian*, Rome renamed Justinian's Code *Corpus Juris Civilis* (the body of civil law).

In succeeding centuries, Rome founded additional universities, fashioning each after Bologna's model, in Spain, France, Germany, and other countries, which all sought Bologna graduates for professors. Oddly, however, from the year 476 until 1866, Italy failed to unite herself under Justinian's *Corpus Juris Civilis*. During these centuries, each Italian locality had its own law: an admixture of barbaric and Roman codes. Then, in 1866, Italy officially adopted *Corpus Juris Civilis* as a universal Code; though inconsistently applied, its influence in Italy grew.

The Visigoths (West Goths), a Germanic tribe 250,000 strong, migrated south from Sweden,[361] pressed upon Rome's frontiers, and requested entry. Upon Rome's refusal, they breached the Empire's border, continued south, sacked Rome, lingered there a few years, and then left. By A.D. 415, the Visigoths had conquered Spain and France, and had settled in Spain. The Visigoth's law was akin to the Anglo-Saxons' folk law and well developed. These so-called barbarians[362] allowed the Spaniards to keep and use civil law to decide their disputes in a form called the *Theodosian Code* but forbade the use of this Code to decide disputes where one of the parties was of non-Spanish descent. In a word, the particular law used to decide any given legal dispute depended upon the parties' ethnicity: if between two Spaniards, the civil law governed; if between two Goths, the *Visigothorum Code* governed; but if between a Spaniard and a Goth, no clear choice of law emerged. Moreover, after a few generations, the stocks had mixed, making distinctions of ethnicity in order to determine the applicable law impossible. Attempts continued nevertheless, creating further confusion.[363]

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[360] See generally §§ 5.1.2, 5.1.3 of this book (discussing Rome's veneration of human reason based on the notion that Adam's fall into sin brought the human mind to mere neutrality, but never to the awful taint of depravity).

[361] The first Swedes were settlers of an Anglo-Saxon colony under their leader Geating.

[362] These barbarians so-called were often less coarse and more learned than were many Romans.

[363] William I., desiring to avoid the confusion fostered in Spain and France by mixing traditions of law that are fundamentally contrary (the Goth's and the Roman's), declared at

Then, in 486, the *Franks*,[364] another Germanic tribe, conquered the north of France; by 586, the Franks had enlarged their rule into the south of France. As a result, two legal traditions divided France: the north of France was under Frankish custom: a Germanic folk law akin to the *Volkriht* of the Anglo-Saxons; the south of France, though part of the Gothic (folk law) tradition, was loosely under civil law, which eventually came to dominate. Nonetheless, the king of the Franks ruled both the north and south of France. During the seventh century, the Goths revised their *Visigothorum Code*. Although inconsistently applied, by 506, those in Spain, France, and—to a lesser degree—, Germany had received Rome's civil law. Not until the twelfth century, however, did Rome introduce the civil law into these nations in the form of Justinian's Code.

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the outset of Norman rule that the common law shall remain the law of England. See generally § 3.5 of this book and accompanying notes, for circumstances surrounding the decision of William I. to maintain in force the common law—known as the *Laws of Edward the Confessor*—in England. The document known as the *Laws of Edward the Confessor* was only a few pages: not a code but a short list of Anglo-Saxon principles of law and government and a fair reproduction of the *Laws of Alfred the Great*. Alfred's laws were a short statement of the Anglo-Saxon's folk law or common law as practiced before the Norman invasion and included an Anglo-Saxon translation of the Decalogue. *See Exodus* 20:1–17.

Though the Normans adopted the common law, the Roman influence had removed the Anglo-Saxon's community-property law from England. The Goths, however, having infused it into the Spaniard's law, the Spanish, centuries later, carried community-property law to the New World. Thus, community-property laws have bypassed England to become reunited with the common law in those American states first settled by the Spanish: Texas, New Mexico, Arizona, California, and Nevada. In addition, four other states have adopted community-property laws: Idaho, Louisiana, Washington, and Wisconsin. "Community property law," says Huston, Price, and Treacy, "developed from Germanic tribal practices introduced in Spain following the fall of the Roman Empire. Early immigrants to the Spanish possessions in the New World carried with them elements of the Spanish Legal system." *Quoted in*, CHARLES E. ROUNDS, Jr., LORING A TRUSTEE'S HANDBOOK 172 (2003). Having persisted among the Germanic tribes in France, some French also carried community-property laws to the New World. "Upon admission into statehood, several of the southwestern states adopted constitutional or statutory provisions continuing the community property system as practiced at that time." *Id.* "Other states, although having no substantial contact with Spanish culture or institutions, nevertheless adopted the community property system, due perhaps to their aim to attract women as settlers." *Id.* The Spaniards, upon settling the lands now within the State of Arizona, discovered that the Navajo tribe vested ownership of marriage property—the most valuable at that time being flocks and herds—in the woman.

[364] *Frank* is an old term, meaning *free* and continues to carry that connotation in English: for example, for one to be *frank* of speech is to be free with one's words. The Franks were so-named because the Roman Empire's slave traders were unwilling to reap an annual harvest of slaves from these Germanic tribes. At bottom, the Franks were a formidable lot, intolerant of slave traders. Thus, to steal a Frank brought to the trader more risk than it was worth. The slave traders preferred easier pickings. *But see* M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 7 (1942).

By the year 1000, each province of France had its own legal system. Although civil law continued to wax stronger in France, its provinces continued to fall into one of two categories: the northern provinces were governed by old Frankish custom (Germanic folk law) with some civil law mixed in; the southern provinces were governed by civil law alone.[365] In 1510, Louis XIV[366] of France ordered a codification of civil law, resulting in the *Coutume de Paris* (French: *Customs of Paris*). Initially, he applied it only in Paris and the surrounding vicinity, but in 1627, this civil-law Code became the law of New France in modern Canada and then spread to French colonies as far away as Detroit in present-day Michigan and French settlements in the Mississippi Valley, including St. Genevieve, the earliest settlement in Missouri.

In 1793, the French overthrew its monarchy. Then, in 1799, Bonaparte, by staging a *coup d' état*, gained control of the French government. Seeking to justify his consolidated powers and fortify his ability to remain above the law while exercising absolute power, he pushed with vigor for a unified legal code for all of France: a version of *Corpus Juris Civilis*. He succeeded in 1804, the French enacting the first version of the Roman Code for all of France, called *Code Napoléon*, later called the French Civil Code of 1804. That same year, Bonaparte crowned himself emperor of the French. Notably, Bonaparte's family had migrated from Italy to the French island Corsica; his father and brothers were civil lawyers from the university law school at Pisa.[367]

Bonaparte lived by the civil-law Code, claiming his power justified his authority. "God," he said, "is on the side of the greatest battalion"; but at Waterloo, his faith in his superior power failed him—as such misplaced faith has done many others before and since. The French Code of 1804 is substantially the *Corpus Juris Civilis* of Justinian and remains in force in France to this day. Some legislation has supplemented the French Code since 1804; though procedural devices are in place to make amendments, these are seldom used.

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[365] *See* 38 MICH. L. REV. 765 (1940).

[366] In the spirit of the civil law, King Louis XIV called himself the sun-king and declared: *L 'Etat, c 'est moi*: "I am the State." See generally § 2.1.2 of this book (discussing scions of Babylonian sun worship). That such claimed deification was popular among the French is shown in that Robspeirre, during his quest for absolute power, claimed that *the people* were the state. Then, upon coming to power, he claimed that *he* was "the people."

[367] See generally § 5.1.9 of this book (discussing the invention of the university as humanism's tool meant to subject all learning to Justinian's *Corpus Juris Civilis* as the universal standard of reason, in the scholastic tradition of the Greeks).

§ 2.12
Germany

In the year A.D. 9, in Teutoburg Forest, the German general Arminius[368] ambushed the Roman commander Publius Quintilius Varus and massacred over 15,000 Roman legionnaires. The few that escaped retreated rapidly to south of the Rhine. As Rome's legions had advanced, they kept their supply lines open by building good roads into the German forests and countryside. Upon the legion's defeat and retreat, however, the Romans quit construction; thus, these roads still lead only to the forested place of Roman defeat.[369] Moreover, due to this defeat, Roman civil law failed to gain any lasting foothold north and east of the Rhine River until at least 1400, when civil law began its gradual reception into the Germanic tribes of these parts. Before that time, the Germanic folk law, sprinkled with civil law, had governed.

By steady creep, however, the Roman Church's university system, over time, achieved with words of priestcraft that which the Roman legions failed to carry out by force of arms. The Roman Church established her universities in Germany, which sought and hired professors from Bologna's civil-law university. Further, courts and parties in business disputes more and more employed civil-law professors for legal advice and as arbitrators, instead of Germanic folk law's juries and sitting judges; as a result, litigants abandoned folk-law's standards of due process and advanced legal arguments based upon civil law. By 1600, civil law in the form of *Corpus Juris Civilis* governed the

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[368] While a youth, the Romans had taken Arminius to Rome as a hostage, where they taught him the military tactics of Rome's legions. Following his victory, Arminius became the Germanic tribes' symbol of their resistance to Roman religion, law, and government. Centuries later he became a folk hero of the Protestant German reformers, during their struggle with Rome—Martin Luther calling him *Hermann*: Arminius's presumed German name before taken captive to Rome. Later, during Napoleon's attempts to subdue the German people under the heel of Roman law, Germany again resurrected Hermann as a symbol of nationalism and resistance to oppression.

The Roman defeat at Teutoburg Forest was among the most crucial battles in world history because it limited the reach of Roman law and government, preserving the folk law from extinction among the Germanic tribes. Thus, in later centuries, the folk law came to Britain with the Anglo-Saxon and Danish migrations, further insulating it from Roman influences.

[369] According to the testimony of visitors to this area, these Roman roads remain intact. The Romans also gave up on conquering the Picts, delaying the reception of civil law in Scotland. The Picts were a tribe cohabiting, along with the Scots, what is now Scotland. During her occupation of Britain, Rome remained in constant war with the Scots and Picts. Closely related to the Scots by descent, the Picts were a fierce bunch. After Columba's reintroduction of the Christian faith among the Picts and Scots, the two tribes, by mutual agreement, merged.

German tribes. Wearing the priest's gown of academic prestige, the civil-law tradition entered Germany and established itself in Roman religious rhetoric.

Tribonianus was the primary architect and chief contributor to the compilation of Justinian's Code.[370] In doing so, he further advanced the semi-deification[371] theory of the state and the state's embodiment in ruler. This doctrine, however, was foreign to the Germanic man's understanding and custom:[372] the Teutonic tribes of the Anglo-Saxons and Danes that had migrated and mixed in Britain, chose their chieftains. Their chieftains, though commanders-in-chief of the militia, never legislated: they neither gave law nor made law. Their kingships, therefore, were limited. The ancient Teutonic tribes—the Anglos, Saxons,[373] and Danes—believed that the power to make law was available only to the gods, never to mere men. In their view, law has always existed from eternity past to eternity future; in their deepest convictions, only their god legislated. Consequently, they believed that men must seek and discover, discern and articulate law's application in particular cases. That a mere man could make law (legislate) was as absent from the Germanic tribesman's thinking as the thought that a man could own land was to the North American Indian tribesman.

Law to the ancient Germanic tribes, therefore, was not a creation of their minds, but of the divine mind. Moreover, they reserved this prerogative of final discovery and discernment of the mind of deity to their moot (the Jury) empanelled or their elders (the Witan) assembled. Therefore, the Germanic tribes of the European continent initially pursued separation of powers: the king had neither legislative nor

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[370] See generally § 2.7.6 of this book (discussing Tribonianus and his part in the formation of Justinian's Code).

[371] *Semi-deification* is Dean Roscoe Pound's term. All false religion gives illusive promises of a measure of deification that enables some men to dominate other men. Such unauthorized attempts at dominion over others are man's usurpations of the Creator's prerogatives. The means of such domination is only by seduction through fear and weakness of the flesh; the result will always be tyranny.

[372] See generally §§ 3.2.2, 3.2.4 of this book (discussing the Anglo-Saxons' folk law and its limitations on government).

[373] The name *Saxon* likely arose from this tribe's fondness for the *seax*: a short thrusting sword similar to the Greco-Roman μαχαιρα (*makaira*). *See, e.g., Ephesians* 6:17. Between the Angel and the Saxon tribes, there was scant difference: strangers called both tribes, "Saxons"; in time, the Saxons called themselves "Angels" or *Angles*, and called their country *Angleland* (viz., "Land of the Angles," later contracted to *England*). *See* M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 207 (1942). "English" is from *Englisc* (of the Angles). Some hold, however, that the spelling "England" originated from the *Koiné* Greek of the Roman Empire: Greek speakers spelled "angel" with αγγελος (*angelos*) and pronounced the double *gamma* (γγ) "ng," resulting in *Engel-land*, contracted to *England*.

judicial powers. Thus, from the fog of antiquity, until well after Magna Carta,[374] the Anglo-Saxons referred to those of the moot (jurors) as *judges*; with these judges' conclusions, the Anglo-Saxon kings were powerless to meddle.

Having glimpsed Rome's total state before it collapsed, however, the continental German rulers of the middle ages, drawn by Roman order and precision, sought their own Roman-styled state, but without total success. Though they named an emperor, only occasionally did enough of the German princes give him support, enabling him to act with rigor. The territory east of the Rhine (Saxony), however, had never been a part of the Roman Empire; each German state in these parts had held fast to its old tribal law: a variation of their common *Volkriht* or folk law.[375]

By 1472, through the Roman Church, Justinian's Code had affected all of detribalized Germany, including Saxony. At that time, and until 1870, the territories of Germany retained forty-six separate legal systems, loosely confederated, much as were the thirteen original American States under the Articles of Confederation. After that, William II of Germany, taken by Rome's spirit, began calling himself *Kaiser*, the German form of the Rome's imperial title *Cæsar*; later, in the days before World War I, he ruled Germany in Roman fashion.[376]

In spite of the Lutheran and Dutch Reformation's offer of Scripture's authority, by the turn of the twentieth century, the only kind of law and government the detribalized Germans had experienced was the product of Justinian's Code: though Christian in name, nonetheless an imperial and totalitarian state in fact. The sweep of German history following the Reformation, says Quigley, reveals that the Reformation—the full sway of the God of Scripture—never fully seized the Germanic mind. However, fascination with the totalitarianism of the Greek city-state and imperial Rome did:

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[374] History regards Magna Carta as one of the great common-law documents and—along with the English Petition of Right (1628), the Habeas Corpus Act (1679), the English Bill of Rights (1689), and the United States Constitution—a foundation of common-law freedoms. More than a document of principles, however, Magna Carta is evidence in words creating a snapshot of an active argument for the application of eternal principles to the folk of those times and circumstances. Magna Carta, says Holt, is one instance in "the history of . . . an argument . . . for the application of a continuous element of . . . thinking." *See* J.C. HOLT, MAGNA CARTA 16 (1965). *Stare decisis*, the argument from prior application (precedent) of an eternal principle to a fresh application is the polestar of the common law.

[375] See generally §§ 3.2–3.6 of this book (discussing the folk law of the Anglo-Saxons as the foundation of the common-law tradition).

[376] *See* CARROLL QUIGLEY, TRAGEDY AND HOPE 409–57, 507–15 (1966) (providing a insightful view of the collective German mind before the twentieth century and the *zeit geist* that reigned in Germany during the period prior to World War I and thereafter).

> Into the insanity of monomania created by the shattering of the Germanic tribes came the sudden recognition of a better system, which could be, they thought, equally secure, equally meaningful . . . This was symbolized by the word *Rome*. It is almost impossible for us, of the West and of today, imbued as we are with historical perspective and individualism, to see what Classical culture was like and why it appealed to the Germans. Both may be summed up by the word "total." The Greek *polis*, like the Roman *imperium*, was total. We in the West have escaped the fascination of totalitarianism because we have in our tradition other elements—the refusal of the Hebrews to confuse God with the world . . .
>
> We also have, in our tradition, Christ . . . And we have in our tradition the Church . . . where clearly human values were neither united nor total, and were opposed to the state. The Germans, as later the Russians, escaped the full influence of these elements in the tradition of the West. The Germans and the Russians knew Rome only in its post-Constantine phase when the Christian emperors were seeking to preserve the totalitarianism of Diocletian, but in a Christian rather than a pagan totalitarianism. This is the system the detribalized Germans glimpsed just before it also was shattered . . . They yearned to become part of the imperial totalitarianism. They still yearn for it. Theodoric, the Ostrogoth (Roman Emperor, 489–526) saw himself as Germanic Constantine . . . For the next thousand years the Germans made every effort to reconstruct the Christian *imperium*, [for example as] under Charles V (Holy Roman Emperor, 1519–1555) . . . The German continued to dream of that imperial system before it sank—one, universal, total, holy, eternal, imperial, [and] Roman . . . Only Charlemagne (died 814) came close to achieving that dream, Barbarossa, Charles V, William II, or even Hitler being but pale imitations . . . The totalitarian *imperium* [was] broken *in the West* into two . . . a[n] [imperial] Universal Catholic Church and a[n] imperial Holy Roman Empire. The former

> still survives, but the latter was ended by Napoleon in 1806, a thousand years after Charlemagne.[377]

About 1900, the German version of *Corpus Juris Civilis* became effective; civil law now clenched Saxony. During the next forty-five years, Germany—arguably the world's most educated nation—revealed the results of allowing men to exercise the total power civil law affords.[378] During the dark days of World War I, many Americans believed that Germany's *Kaiser* was the embodiment of evil.

On the European continent, the Germanic folk law faded away. The Anglo-Saxons' fifth-century migrations to Britain with their *Volkriht*, however, had put it beyond the direct force of civil-law seduction, prevented its disappearance, and kept it in safekeeping; the eight-century Danish migrations then strengthened it and Scriptures brooded over it.

In summary, since the Lutheran Reformation, Germany has received and then embraced the civil-law tradition with its legislative supremacy and state-controlled judges:

> Roman law, as embodied in the *Corpus Juris Civilis*, was "received" in Germany from the 15th century onward . . . In Germany the responsibility for the development of the law rests with a legally trained state-controlled bureaucracy rather than—as in 18th and 19th century England—[independent judges and jurors] . . . German judges traditionally have been university-trained experts *under the authority of the state* . . . .[379]

§ 2.13
France, Scotland, South Africa, Asia & the Americas

In 1804, Napoléon Bonaparte enacted Justinian's Code under the title *Code Napoléon* for France and conquered territories: Belgium and the

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[377] *Id.* 410–11.

[378] Nazism seduced Germany through its lack of discernment, not its want of knowledge. Likewise, the source of the Christian's problem is not his intellectual *inability* to discern between true and false understanding of this present world, but his *undeveloped ability* to discern. On the other hand, the unredeemed man is often plagued with the same undeveloped intellect, further exacerbated by his moral *inability* to accept the conclusions of sound reasoning. See generally § 5.1.2 of this book (discussing 1 *John* 5:20 and the talent of God's people to discern, accept, and obey the truth). Man's problems arise from two lacks: lack of right knowledge (a conscience informed aright) and lack of understanding of knowledge obtained.

[379] "Roman Civil Law" *in* ENCYCLOPAEDIA BRITANNICA (15th ed. 1974) (emphasis added).

country of the Rhine. The *Code Napoléon* remains in force in Belgium.[380] Until 1803, France owned the Louisiana Territory, which included what is now the State of Louisiana and most of the Missouri River drainage basin. Nevertheless, the *Code Napoléon* never become the law of Louisiana because in 1803—the year before Bonaparte enacted the *Code Napoléon* for France—Bonaparte sold the Louisiana Territory to the United States, Americans then calling it the Louisiana Purchase. Six years later, in 1809, the United States formed the Territory Orleans—later to become the State of Louisiana—; in 1825, the French-speaking folk dominating Territory Orleans adopted a civil-law Code almost identical to the *Code Napoléon*. In 1627, the *Coutume de Paris* (French: *Customs of Paris*) became the law of New France in modern Canada. In 1763, however, when France ceded Quebec to Britain as spoils of the French and Indian War, Quebec had never received the *Code Napoléon* because France did not enact it until forty-one years later, in 1804; in 1866, however, Quebec's French descendants adopted it. Louisiana remains under a derivative of Justinian's Code; Quebec remain under the *Code Napoléon*.

Most Central and South American countries use the *Code Napoléon*. Japan uses a part French and part German version of Justinian's *Corpus Juris Civilis*, Japan's imperial government having copied much of Germany's civil-law government as it stood under the Code of Bismarck in 1889.[381] Vietnam uses a French version of the civil-law Code.[382] A few modern countries have only *Corpus Juris Civilis* with medieval glosses. Ethiopia received civil law from Russian Church missionaries, accompanied by traders who continued to propagate and use it there. Thus, most of Ethiopia's law is an ecclesiastic or canon-law variation of civil law.[383] South Africa's law is codified only in part; though unique, it is somewhat comparable to the systems of Louisiana, Quebec, and Scotland.

Scotland, though a civil-law country, has never adopted a modern version of the civil-law Code.[384] Though Scotland's law has its basis in the

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[380] See generally § 2.11 of this book (discussing Bonaparte's part, respecting French reception of civil law).

[381] *See generally* CARROLL QUIGLEY, TRAGEDY AND HOPE 561–70 (1966) (comparing Germany and Japan during their rise to tyranny and aggression, before and during World War II).

[382] *See* 53 A.B.A.J. 159 (1967).

[383] *See generally* § 2.8.3 (discussing Roman canon law as the complimenting and corresponding image of Roman civil law).

[384] *See* 22 TUL. L. REV. 12–23 (1947), B.U.L. REV. 22 (1942). From the seventh through the twelfth centuries, during which papal power completed its seduction of the Celtic Church, Rome's priesthood introduced its canon law and tribunals into Scotland, based on

Roman civil law, dating back to the *Corpus Juris Civilis*, Scotland's law remains un-codified. Scotland's legal tradition is mixed, but due to Scotland's closeness to the common law—its roots in folk-law-like Celtic elements of law and its Protestant roots in common with England—, Scotland follows the controlling principles of common law and government. Though the British Parliament has governed Scotland since Scotland joined with England to form the United Kingdom of Great Britain, Parliament sometimes passes different laws for the common-law countries of England and Wales from those for Scotland.

On the other hand, Parliament sometimes applies the same law to both countries—if that law conforms to both the law of Scotland and of England. For example, civil law does not recognize the common-law trust, but Parliament has made an exception, choosing to provide for the recognition of common-law trusts in Scotland. Therefore, trust law is the same in both England and Scotland. "In everything but terminology the [common law] has everything but overcome a received Roman law in Scotland."[385] The United Kingdom's courts of last resort, whether the Privy Council or House of Lords, taking appeals from civil-law Scotland must apply principles of *stare decisis*, the polestar of common-law tradition, thus bringing Scotland's law within the pale of common-law due process and the rule of law.

Moreover, retaining common-law-like principles from the early Britains, the Scottish lawyer's method has provided an indispensable stressing of first principles in using the common law's *stare decisis*, as distinguished from demanding use of exact case precedent only. "[The] Scottish lawyer . . . [searched] for the principle which could be applied to the particular facts, rather than the English method of looking for an exact precedent."[386] Civil-law countries, provinces, and states that fall

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Justinian's sixth-century Code from the Eastern Roman Empire. The English universities, Oxford and Cambridge, having closed their doors to Scots, forced Scots to universities on the continent, who, upon their return, further entrenched the civil-law tradition in Scotland.

Although the University of St. Andrews (founded 1413) included in its mission the teaching of the civil and canon law, evidence that it taught these is scant. The University of Glasgow (founded 1451) taught the civil and canon laws early on. One of its students, William Elphinstone, went on to study canon law at the University of Paris and then to teach at the University of Orléans. Then, after his appointment to the bishopric of Aberdeen, Elphinstone founded the University of Aberdeen (1495), where the civil and canon laws were taught until 1560, when the Protestant Reformation removed papal authority and canon-law tribunals from Scotland.

[385] ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 2 (1921).

[386] EDMUND HEWARD (*SOLICITOR*), LORD MANSFIELD: A BIOGRAPHY OF WILLIAM MURRAY *Preface* (1979). Rightly understood, *stare decisis* demands analogies, through which threads a common principle. An analogy is not two identical things, but two things alike at

under a common-law appellate umbrella—such as Scotland, Louisiana, and Quebec—, retain particular civil-law doctrines; but as to first precepts, over time, common-law appellate authority, case by case, conforms the law and government of these jurisdictions to common-law principles. For example, common-law principles apply to appeals from Louisiana's civil-law tribunals to the United States Supreme Court.[387]

§ 2.14
Modern Civil Law Development

Traditional Roman civil law takes three similar shapes, all pursuing the same ideals and existing as a single tradition: Roman civil law (Justinian's Code or *Corpus Juris Civilis*), Roman canon law (*Codex Juris Canonici*), and commercial law. Of these three, Justinian's Code forms the archetype. Even though for administrative convenience, civil-law jurists view the canon law and the commercial law—as also their maritime and military law—as separate categories, both are functions of Justinian's Code:[388] the canon law arising from Justinian's Code and the commercial law conforming to the ideals of Justinian's Code. Both common lawyers and civil lawyers use the phrase *civil law* in an unrestricted sense to connote Justinian's Code, canon law, and commercial law as a single tradition. Civil lawyers, on the other hand, sometimes use "civil law" in a restricted sense to denote only the substantive law (as opposed to procedure) of Justinian's Code, the canon law, and commercial law.

After the year 1583, Justinian's Code became known as *Corpus Juris Civilis*; the ideals it embodies have permeated and now control the modern civil-law tradition. By focusing on the will of the state, Justinian's Code provides the core character of modern civil law: the individual's direct responsibility to the state as embodied in the person of the emperor and his state agents; the individual's indirect responsibility to the state through the substantive law—*e.g.*, family law, inheritance, property, torts, and contracts.

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some point or points. Thus, every analogy of one thing to another breaks down at some point; if it does not, there is no analogy, but rather, two identical things.

[387] See generally 36 LOY. L. REV. 269 (1990) and 36 LOY. L. REV. 247 (1990), for articles concerning civil law and the United States Constitution).

[388] For example, Justinian's Code includes a section of maritime law called Νομος Ρωδιον Ναυτιχος (*Nomos Rhodion Nauticos*) and a section of military law called Νομος Στρατιοτικος (*Nomos Stratiotikos*), which are also functions of Justinian's Code.

In A.D. 534, Justinian compiled his Code; over the next few centuries, however, it fell into disuse. Then, first in the East and later in the West, two emperors resurrected it from obscurity, both with lasting effect. In the East, in A.D. 888, emperor Leo VI revived Justinian's Code by enacting the *Basilica*,[389] an abridged Greek summary. The *Basilica* remained the law of Greece until she adopted a modern version the civil-law Code following World War II.[390] Then, in the West, about 1080, Gregory VII lifted Justinian's Code from neglect, began the revival of Roman law, and formed the first university in Europe at Bologna in order to bring all disciplines of learning under that Code's supposed scientific perfection. From Bologna, Rome's university system expanded throughout Europe. Professors and students approached Justinian's Code as though it were a collection of divine oracles from Justinian: the semi-deified lawgiver and chief of church and state. In their minds, Justinian's Code carried supreme authority on earth; they venerated it as perfected reason in justification of the will of the state.[391]

Justinian's Code permeated Rome's universities; jurists applied it to matters of church and government as one total state. In the same sense that Scripture declares the Word of God written to be the seed received by the ovum of faith,[392] the Bolognese scholars and their progeny taught that Justinian's Code was to be *received* as immutable and binding law. The European world called Justinian's Code the *jus commune*: the law common to timeless and temporal matters for all people, tribes, nations, and times.

Where the judges applied the ideals of the Justinian's Code to matters of the Roman Church, civil lawyers called it *canon law*; where the judges

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[389] See generally app. 15 of this book and accompanying notes, for discussion of *βασιλεια* (*basileia*: the Greek term for kingdom as jurisdiction) and its adjectival form *βασιλικος* (*basilikos*), as understood in the phrase *βασιλικος νομος* (*basilikos nomos*: imperial law) in the Bible and in pagan inscriptions.

[390] *See* BERGER, *supra* note 236, at 372.

[391] Gregory VII cast about the common law a cloud of suspicion that clings to civil-law culture: "Gregory VII . . . sharply remarked 'Christ has not said "I am Custom", but he has said "I am truth."' R.C. CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 3 (1997). In contrast to Gregory's rebuke by inference, Jesus Christ gave truth direct definition: "Your [God's] Word is truth." *John* 17:17. Christ never puts Babylonian or Roman law on the level of God's Word, i.e., truth.

[392] See, *e.g.*, 1 *Peter* 1:23, where Peter describes the Word of God written with *σπορας* (*sporas*: English, "spore"; Jerome has *sperma*). The Word of God written claims to be the incorruptible seed; thus, one infers aright that the ovum of faith receives this seed. The new birth results from the conception brought about by the implantation of the Word of God in the womb of faith. Civil lawyers claimed a like potency for Justinian's Code. The two concepts, however, differ: the Word of God is divine truth and, therefore, living and able to reproduce life in abundance; Justinian's Code is human reason and, therefore, stagnant and able only to maintain the status quo.

applied Justinian's Code to the state and matters deemed temporal, civil lawyers called it *civil law*. These labels, however, were a matter of convenience, not designations of separate Codes, the two being fundamentally the same. For this reason, Rome's universities maintained—and still maintain—the canon law and civil law as a single academic discipline; in addition, Europe's imperial courts of church and state understood and applied both as a single body of law:

> The study of canon law came to be joined with the study of civil law in the Italian Universities and a degree conferred on a student who had completed a full course of study was Juris Utri que Doctor or Doctor of Both Laws, referring to the civil law and the canon law (the J.U.D. is still granted in some universities in the civil law world). Because the two were studied together in the Italian Universities, there was a tendency for them to influence each other . . . this Roman civil law–canon law *jus commune* was the generally applicable law of Europe.[393]

The law of continental Europe, South America, China, Japan, and Russia, for example, adhere to the same fundamental law as the Vatican. Through the conduits of university, church, and state, the doctrines of Roman civil law and government have percolated into the Western world's thinking, captivating and capturing its law and government of church and state, in substance and in form, and then spread worldwide. The common-law countries, however, have successfully resisted its doctrines. "We have had," says Merryman of the United States, "no reception of Roman law."[394]

As before stated, the civil-law tradition is as old as Babylon. The ancient Romans founded their law and government upon civil-law ideals, issued dogmas, and then compiled their Code upon those decrees; the imperial Roman Church then established her hierarchy upon civil-law principles and that Code. The signing of Magna Carta in 1215 and its confirmation in final form in 1225, however, further excited Rome to produce a version of the canon law in code form to meet the threat that Magna Carta posed to imperial Roman power. Thus, Rome's civil lawyers collected legislative decretals of the various popes, then freely selected

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[393] *See* BERGER, *supra* note 236, at 11.

[394] MERRYMAN, *supra* note 82, at 10. The writer understands Merryman to mean that common-law courts have always rejected civil law's attempts to gain inroads into the common-law tradition.

and revised these compiled decretals so that their Code's organization corresponded to Justinian's Code, and presented these to Gregory IX, who then issued them as his personal legislation in 1234.

In 1317, John XXII published the decretals of his successor pope Clement V called *Clementines*, which came to form the fourth of the six parts of the *Corpus Juris Canonici*, completed in 1502—though not so titled until eighty years later. Then, in 1582, Rome officially titled this collection *Corpus Juris Canonici*. Two years later, in 1584, Rome fashioned a title for Justinian's Code that corresponded to *Corpus Juris Canonici* (the body of the canon law): *Corpus Juris Civilis* (the body of civil law). By organizing her canon-law Code according to the organization of Justinian's Code and by titling the two codes with corresponding names, Rome intended these codes to be symbiotic images of one another: to be educated in one is to understand the doctrines of the other; to justify the one is to justify the other. Imperial church and state, therefore, now constituted solidarity as a single and total state. Moreover, Roman priests, loyal to Rome, served as judges in the tribunals of both church and state.[395] The commercial law—having developed from business practices in Europe, from guilds, and from maritime activities of the commercial world—, civil-law jurists later added as a subset of Roman civil law.

Almost the entire globe is subject to the ideals of either the English common-law tradition or the Roman civil-law tradition. The common law governs those few countries that trace their tradition of law and government to England: the United States of America and her territories—except Puerto Rico—; the British Commonwealth[396] countries such as Wales, Ireland, Australia,[397] and New Zealand are common-law jurisdictions.[398] The Canadian Province of Quebec and the American State of Louisiana are civil-law jurisdictions.[399] At first glance, South Africa's law and government appears much as the common-law tradition, but in practice, the country adheres to civil-law doctrines. For example,

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[395] *See* MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 33–34 (1936).

[396] *Commonwealth* is the common abbreviation for "British Commonwealth."

[397] Papua New Guinea derives her common-law tradition from Australia. Before Germany's defeat in World War I, however, part of New Guinea was a German colony under the civil law.

[398] Recognizing American common law's shared heritage with English common law, common lawyers often refer to American common law as Anglo-American law.

[399] The criminal law in Louisiana "is wholly English, . . . [T]he fundamental common-law institutions, supremacy of law, case law precedent, and a hearing of causes as a whole in open court, have imposed themselves on a French Code and have made great portions of the law Anglo-American in all but name." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 1–2 (1921).

though South Africa has never codified its system of civil law to the degree of other civil-law countries, her judges cite for authority the Roman Code.[400]

Most of the remaining nations of the world are *civilized*,[401] having derived their law and government from Roman civil law as codified in Justinian's Code and its modified versions, including Roman canon law.[402] Moreover, worldwide, the civil law maintains a shared essence:

> Continental lawyers have a *lingua franca* in the terminology of their several codes; and their idiom is perfectly clear to the [civil] lawyer in Egypt, in Japan, in Brazil, in Quebec. It is true there are many radical differences, and one need not go far to discover divergences in plan between, let us say, the French *Code Civil* and the *German Bügerliches Gesetzbuch*: but both of these fruits hang on the same stem. To them, and to the philosophy that underlies them, the English common law is alien.[403]

§ 2.14.1
Legal Science:
Civil Law's New Label

The civil-law tradition holds the legal cast of the scholars in veneration, trusting their opinions of what the law ought to be and supporting the legislator as he enacts the scholars' conclusions. The civil-law world speaks of any renewed study of *Corpus Juris Civilis* in religious terms: *e.g.*, a *revival* of Roman legal studies.

At Bologna, Rome established Europe's first university, founding all its academics upon the study of Justinian's Code, to which all its disciplines and colleges must conform. The scholars of that Code referred to themselves as the *glossators*; later, a group of civil-law scholars known as *commentators* arose; after which, a school of civil-law scholars calling themselves *humanists* gained preëminence. Since the Reformation's

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[400] *See generally* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (Reinhard Zimmermann & Daniel Visser eds., 1966) (presenting evidence of symbiosis between English common law and Roman civil law in South Africa).

[401] The term *civilized* derives from civil-law culture and means, in its etymological sense, "to make citified"—all in the spirit of the Greeks' *πολις* (*polis*: city or "city-state"), having come through Pergamos from Babylon.

[402] F.C. Auld, *The Common Lawyer and the Civil Law*, vol. 2, No. 1 U. Toronto L.J. 119 (1937).

[403] *Id.*

aftermath, and until the present, a movement of civil-law academicians has arisen out of Germany, titling their methods *legal science*; their domination of the civil-law world has enabled them to extend their notions into the common-law countries.

Over the centuries and despite any differences, all the foregoing groups of civil-law scholars proceeded upon a shared notion: the mind of man is capable of remaining above bias and error. By this optimistic premise, these scholars erred before they began because the mind of man is incapable of escaping the debilitation of bias and error. To hold otherwise is contrary to Scripture, the senses, and history.

Nevertheless, resting on this false foundation of human ability, the German-legal-science movement has striven to refine and arrange the doctrines drawn from their study of Roman civil law into an all-embracing order, resulting in promulgation of the German Civil Code of 1896—now the model for civil-law systems worldwide. Thus the German-legal-science scholars of the past two centuries continue rule of the civil-law world from their graves; their influence has even permeated the United States and changed the way American law schools teach law: in the late nineteenth century, law professors organized appellate findings for reading and teaching law by the case-study method.[404]

German legal science is also the momentum behind the *American Restatements of the Law*: prepared by law professors and scholars, at times admitting to using these restatements to nudge the law in the direction they want it to go. Even so, the common law's independent judiciary maintains control over interpretation and application of the *American Restatements*. Thus, the courts use the *Restatements* to advance common-law principles in two ways: by providing detailed statements of dominant common-law rules in the several state jurisdictions; by continuing to refine the *Restatements* by overlaying them with court opinions, interpreting and applying the common law, and filling gaps with common-law principles.

The legal-science movement views statutes, regulations, and other expressions of law as phenomenon arising from the material world of which man is a part and beyond which man is unable to transcend. In addition, the legal scientist accepts the law of Rome as empirical data,

[404] The case-study method of legal education remains in name but has dumped overt declarations of abstract materialism: students discern whether case opinions are consistent with previous findings according to *stare decisis* and trace application of first principles through time, through appellate opinions.

presuming it consistent with itself and with nature.[405] In short, modern legal science sets forth old notions of abstraction, dressed up in new clothes. For example, any system of law and government, taught Hans Kelsen, in order to be valid, must be *pure*, that is, independent of any values outside itself, such as the leasons of the past (history). A law, therefore, is only valid, says Kelsen, as the state abstracts it from all else, save the mind and will of the state. Such an abstracted piece of legislation he calls a *norm*, commanded by the state and independent of any other external authority, other than some other basic norm (*grundnorm*) that the state has already commanded: such as, for example, the state's decree that all must obey its commands. Thus, the circle of reasoning ends where it began.[406]

Because the German legal-science movement appeals to intellectual elitism that attends the purity of cold logic divorced from the realities of living and moral sensibilities, it has captured the affections of heady, yet influential, Americans. For example, Supreme Court Justice Holmes once wrote to Sir Frederick Pollock, "For my part, I often doubt whether it would not be gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law." The gain of which Holmes speaks, however, he reserves only for the intellectual elite: "It

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[405] The materialism of German legal science has encouraged our common-law American courts to abandon *stare decisis* and to rely upon the conclusions of psychology in framing decisions. At bottom, psychology deals with the material aspect of human behavior, and attempts to discern from compiled records of human behavior, signs enabling predictability of future behavior. The Brandeis brief marks the visible entrance of psychology into credibility before American courts. In the 1908 case *Muller v. Oregon*, Louis Brandeis filed a brief with the United States Supreme Court markedly different from any other previously submitted to the Court: it contained only two pages of legal argument and over one hundred pages of literature dealing with theories of psychology and economics. Brandeis included reports from statistical bureaus, hygiene and factory inspectors, and other evidence traditionally presented before the Jury. In order not to risk the Court's rejection of their cause by rejection of Brandeis's unconventional brief, Brandeis's partner submitted a conventional brief relying upon *stare decisis*.

[406] *See generally* HANS KELSEN, THE PURE THEORY OF LAW (1934). *See also generally* HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE (1945) (teaching that valid laws are *norms* handed down by the state that have been kept pure and free of any values outside of all norms handed down by the state). Kelsen's *pure theory of law* makes clear in modern terms, the ancient and controlling feature of civil law: law is valid only as the state abstracts it from all else, save the mind and will of the state.

Kelsen taught administrative (civil) law at the University of Vienna and then at the University of Cologne, until forced to flee to Geneva, Switzerland, lest the Germans gather him to a German prison camp for Jews. Immigrated to the United States in 1940, he lectured at Harvard Law School 1942. In 1945, Kelsen became full professor at the University of California, Berkeley School of Law at Boalt Hall; from 1953–1954, Kelsen was visiting professor at the United States Naval War College. Hans Kelsen had wide leave to inject his doctrines into the American mind.

would be a gain," said Holmes, "*at least for the educated*, to get rid of the word and notion of sin."[407] Holmes's words are contrary to the common-law tradition, which rests upon righteous zeal for the truth and abhorrence for violation of the truth, the deepest motivation known. According to both Scripture and the common-law, the majesty of the law is trustworthy of one's moral affections.[408]

Legal-science theories such as Kelsen's *pure theory of law* are not new. It boasts of objectivity and neutrality, pure reason, but its impersonal principles have persisted among men since the fall of Adam and the settlement of Babylon. Civil lawyers are proud of legal science's abstract methodology divorced from the litigants' facts and circumstances, and all other experience. "[T]he absence of anything equivalent to it [abstract methodology] in the common law is one of the reasons why civil lawyers think of the common law as crude and undeveloped."[409] Theorists conceived legal science in the abstract imaginations of the human mind; there it dwells:

> This high level of abstraction—this tendency to make the facts recede—is one of the most striking characteristics of legal science to a lawyer from the United States or England. The principles developed by legal scientists have been taken out of their factual and historical context, and are consequently lacking in concreteness. The legal scientist is more interested in developing and elaborating a theoretical scientific structure than he is in solving concrete problems. He is in quest of the evermore pervasive legal truth . . .

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[407] STRYKER, *supra* note 48, at 282 (emphasis added). As to sin, Stryker held that all are sinners, but only a few are accused and arraigned as criminals in the courts of men, where other sinners sit in judgment of them.

[408] *See, e.g., Psalm* 119: 113, 163. In both of these verses, the phrase translated, "I love your law," is identical: תורתך אהבתי (*toerahtica 'ahavatea*). Further, the Semitic poetic structure of verse 113 sets this phrase in antithetical parallel to "the hate of abstract logic" (סאפים שנאתי: *saafen sahneyathe*): thinking disconnected from the right premise. Verse 163 sets the phrase in antithetical parallel to "hate and abhorrence" of unfounded ideas. Thus, David presents one's love of God's law as the opposite of one's love of pure logic and lying. In addition, both passages equate God's *law* (תורה: *torah*) with God's Word (רבר: *daber*). *See also generally Psalm* 119:165 (attributing personal peace to those loving God's law).

Elsewhere, Scripture uses David's term for "unfounded ideas" in verse 163 to describe one whose logic is impeccable, but his conclusions are, nonetheless, false. "No matter how persuasively or 'logically' . . . [he] might speak, his words are groundless and therefore false unless based on God's self revelation." Herman J. Austel *Shequer* (שקר): *Lie, Falsehood, Deception*, 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 956. By making empty promises, such men raise vain hopes. *See id.* Their words, writes Jude, are "over-blown" (*'υπεροκος: hupairogkos*): i.e., big talk. *See Jude* 16.

[409] MERRYMAN, *supra* note 82, at 63.

> [I]ntuition, human unpredictability, the subconscious, and other irrational behavior, despite their powerful influence on human affairs, are excluded from this process . . . [T]he result is a highly artificial body of doctrine that is deliberately insulated from what is going on outside, in the rest of culture.[410]

Common lawyers, on the other hand, point out the harsh results of legal science's retreat from factual reality into pure reason: from the political brutalities of the ancient past to the unprecedented genocides and other atrocities of the twentieth century. In short, law abstracted from fact has emboldened men to justify tyranny. By concentrating on cold reason, civil law strives to be impersonal. In addition, this same divorce of law from fact refuses to recognize, reward, and encourage the God-given spark of intrepidity that, at times, impels one to rise above one's mundane nature. Nevertheless, legal science purposely divorces itself from the unavoidable reality of the unpredictable passions inborn in human behavior and legal conflict—from righteous anger to unrighteous greed—believing this to be its advantage over the common-law tradition. Since jurors and judges—not legal theorists and legislators—who wrestle with real conflicts dominate our common-law tradition, legal science has made few inroads among American lawyers.[411]

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[410] *Id.* at 64–65. Civil law, more than Anglo-American common law, is fraught with fictions intended to insulate the law from the unpredictable happenings bobbing forth from human affairs:

> The German Legal Code contains a great number of . . . fictions . . . [i]n Anglo-American law the number of fictions . . . is small . . . [such as] "[c]orporate personality," "constructive notice," and many of the doctrines of the "relation back" of title . . . .

See generally L.L. Fuller, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 537–38 (1930–1931), *referring to* the statutory fictions of the German Legal Code *as discussed in* Bernhöft, *Zur Lehre von den Fiktionen* (n.p. 1907); Krückmann, *Warheit und Unwahrheit im Recht*, 1 ANNALEN DER PHILOSOPHIE 114 (1919). Fictions are not only a common feature of the civil-law codes, but also the inclining mindset of civilians: "[T]he French writers," says Fuller, "are rather ready to apply the term 'fiction' to any sort of legal construction which involves the notion of substitution or comparison. Perhaps they are influenced by the example of their own Code." L.L. FULLER, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 384 (1930–1931).

[411] German legal science and kindred notions under other labels are ever crouched at the door of common-law countries. Scholastic lawyers make slavish adherence to *elegantia juris* (the symmetry of law; German, *begriffsjurisprudenz*); Roscoe Pound called such faith in naked logic *mechanical jurisprudence* and *slot machine justice*. *See* Roscoe Pound, Address to the American Bar Association, 29 Aug. 1906, *cited in* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 14–15 (1997). "The nadir of mechanical jurisprudence," says Pound, "is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions." *Id.*

§ 2.14.2
Modern Civil-Law Procedure[412]

All aspects of procedure in the civil-law tradition—administrative, civil, and criminal—have their common origin in Roman civil and canon law. Underlying civil-law procedure, therefore, is dependence upon the mind to the exclusion of experience, the direct perception of witnesses, and tangible evidence. In non-criminal matters, civil-law procedure divides into three separate phases, in the following order: a pleadings phase, an evidence stage, and a decision stage. In the pleading stage, civil lawyers submit pleadings to an appointed *hearing judge*. Then, in the evidence-taking stage, the hearing judge takes the evidence and prepares a summary of his conclusions. Last, in the decision-making stage, a different set of judges considers the summations of the hearing judge and counsels' briefs, and delivers a decree. The modern hearing judge descends from the Roman office *praetor*; the modern decision-making judge descends from the Roman office *judex*.[413]

In civil-law tribunals, there is no *trial*, as common law understands that term: no time of intense and public oral testing and personal confrontation of parties, counsel, and witnesses, giving fair play to the facts and the law. Moreover, being no trial, there is no jury. The belief that the mind of man remains untainted from the fall of Adam underlies civil-law procedural theory. For the civil lawyer, therefore, the degree to which the consideration of all aspects of a legal conflict is isolated to human will and reason is the degree of likelihood that judgment will be fitting. And why not? To the civilian attorney, the will of the state is of greater importance than the facts and circumstances of any relationship. Abstract reason, following the will of the state, therefore, is the goal of the civil law. According to the civil-law tradition, to allow consideration of a legal question to include anything outside the Code (the state's *corpus* of reason), supplemented with pure reason of the judge, will skew sound judgment—nature, higher law, conscience, a shocked conscience, bowels of compassion, and undeniable—though sometimes unexplainable—circumstances are of no consequence.

Civil-law procedure is more relaxed than common-law procedure; in a word, it is non-adversarial. Strategy and tactics need not figure into the

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[412] *See generally* MERRYMAN, *supra* note 82, at 111—32 (discussing modern civil law's civil and criminal procedure and the propositions in §§ 2.14.2, 2.14.3 of this book).

[413] See generally § 2.7.2 of this book (discussing the distinct roles of *praetor* and *judex*).

civil lawyer's procedural consideration because there is no courtroom battle to prepare for; no major public event as a final contest betwixt the parties, before the Jury, and for the public's contemplation. There being no trial, there are no pretrial proceedings.

Modern civil-law procedure results from medieval canonic procedure; thus, because civil-law attorneys and judges conduct their procedure foremost in writing as opposed to speaking, civilian procedure is unseen as opposed to being in public view. The judge making the final judgment in a civil-law tribunal never sees the evidence or the witnesses, but only considers the summations of the evidence and testimony as written up by the hearing judge. Because the civil-law abstracts the decision-making judge from the case, his consideration of evidence is *mediate*: i.e., second-hand through a mediating judge called a hearing judge. Thus, the civil law insulates the judge from the life of the conflict. Moreover, this mediacy of civil-law procedure demands the written word over the spoken word and the logic without the senses. In short, the human touch is absent.

The civil-law tradition guards its process from interpersonal human perception: intonations of speech, observation of eyes, personal idiosyncrasies of and between witnesses, judges, attorneys, and parties. Common-law features, such as cross-examination, can only occur orally, and therefore, are unknown in civil-law procedure. Moreover, oral examination of a witness is inescapably confrontational: direct, rapid, *immediate*, and personal. In civil-law tribunals, however, the direct pressure of confrontation of witnesses never occurs. In fact, the words of a witness's spoken testimony never enter the record; the court makes no verbatim transcript. Instead, experts summarize sworn statements for consideration of the decision-making judge. Medieval canon-law methods and devices persist in the civil-law world.

In summary, civil-law procedure is inquisitional: written, indirect, secret, relaxed, and non-confrontational; common-law procedure is adversarial: oral, direct, public, intense, climatic, and confrontational.

§ 2.14.3
Modern Civil-Law Criminal Procedure

Nowadays, civil-law procedure sometimes uses forms of the common-law tradition such as the Jury, counsel for the accused, some oral proceedings, but denies the power thereof, that is, disallows the power of independent judgment and choice of all involved with government—judges, lawyers, and especially the juror—that proper forms bring.

Civil lawyers, recognizing in their criminal procedure a lack of tools to guard fundamental rights, call for four changes: use of the Jury as fact finder to balance the danger of abstract reason, oral and public procedure in place of secret written procedure to bring criminal prosecutions into the light of public scrutiny, provision of legal counsel for accused so that he will be advised of his rights,[414] and limitation of the state's unbridled intervention in the criminal process so that the accused receives fair play. Nevertheless, the leading fundamentals of the civil-law tradition remain in place; consequently, such attempts at change bring merely new forms still controlled by the old civil-law notions: state control of the courts and procedure.

Because civil-law criminal procedure is never a public event as it is in common-law countries, arbitrary state action and state intervention is commonplace. Regardless of reforms, the underlying policy of the civil-law tradition remains: the state must bar any judicial attempt to frustrate the will of the state. Whether the legislation comes from a body of legislators or a single dictator, civil-law tribunals are to recognize legislation as the will of the state, enforce that will to the letter, and justify it with reason—all without judicial dissent. Some civil-law countries, such as Spain, have adopted the appearance of trial by jury in criminal cases. When examined, however, the differences between Spain's conception of a jury and the common law's conception add up to two fundamentally different ideals: the common law's respect of fundamental rights by forbidding any meddling with the reasons for the Jury's verdict and the civil law's overarching goal to vindicate the state's will. "[T]hese are, particularly, when they accumulate," writes Merryman, "important differences between our conception of a jury and theirs."[415]

Being a tradition of revolution, the civil law follows its tendency to do away with the memory of the past and reform the world through the state's decree of rationalistic law, i.e., state positivism. Professional government investigators, police forces, prosecutors, other criminal-law experts, and exclusion of private involvement in the criminal-law system characterize civil-law criminal procedure, all of which tends toward total state power.

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[414] The Constitution's Sixth Amendment—borne out of struggle unto bloodshed—require assistance of counsel for the accused: "In all criminal prosecutions the accused shall enjoy . . . the assistance of Counsel for his defence." U.S. CONST. amend. VI (capital letters and archaic spelling in original). To ignore this right is to undermine the common law's distinctive adversarial temperament: a conviction that fully-joined judicial combat by skilled counsel is an effective method for the discovery of truth.

[415] *Id.*

§ 2.15
The Civil Law's Maxims

[The common law] has been able to receive and to absorb the most diverse bodies of doctrine and the most divergent bodies of rules, developed outside itself, without disturbing its essential quality.[416]

The discovered maxims of the law of nature, says William Blackstone, are the best and most authentic foundation of human laws. Throughout history, and the world over, folk have discovered such maxims, using language and word pictures fitting their own times and circumstances. Maxims of nature's laws are the first principles that serve as tests for one's conclusions concerning that which is right and that which is wrong, that which is lawful and that which is unlawful. Through mere observation and rumination, men have discerned the way this world works and have fashioned their conclusions into pithy, memorable words and phrases. Through the centuries, Roman civil lawyers have compiled such observations. As far as these have arisen from the power of observation through the natural ability to discern according to *Romans* 2:14–15[417] and as these comport with truth, the maxims of the civil law are worthwhile.

As a young student, William Blackstone excelled at mathematics; years later, he saw the value of civil-law maxims much as a student of mathematics sees the value of Euclidian geometry: both encourage the practice of clear and concise awareness and reasoning. Though Blackstone acknowledges the worth of Roman law for its maxims,[418] other common lawyers of note have long remained, nevertheless, intolerant of civil-law maxims:

> It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and disqualifications to them are more important than the so-called rules.[419]

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[416] ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 5 (1921).

[417] See generally § 5.1.2 of this book (discussing *Romans* 2:14–15 and natural law).

[418] *See* 1 BLACKSTONE, *supra* note 12, at 33.

[419] 2 JAMES FITZJAMES STEVENS, HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 n.1 (1883), *quoted in* Brian A. Garner, *Appendix A: Legal Maxims*, *in* BLACK'S LAW DICTIONARY 1615 (7th ed. 1999). "Other scholars," says Garner, "have been equally derisive." *Id.* For a

The remedy to the foregoing objection is to acknowledge that legal maxims are first principles, which are the foundation of the common-law tradition—the standard of law threading through case precedents. Maxims put first principles into clever and memorable neatness. Put another way, a legal maxim is a first principle reduced to a proverb. By one's showing that the so-called exception to the maxim is, in fact, a distinguishable sub-principle, one will vindicate the principle. The one ignorant, or disrespectful, of the applicable first principle, however, will use exceptions to whittle it down to a nub of nullity.

Being mere human formulations, Roman legal maxims are unworthy of *veneration*, but have proven worthy of consideration. After brief appraising the worth of civil-law legal maxims, Brian Garner concludes: "But there is an element of fun in legal maxims: they sometimes express surprising insights—and these from ancient writers. Though they will not clench arguments, they will delight many readers who have a historical bent."[420] Many of civil-law's maxims are crisp expressions of common-law principles. As are the rest of the civil law, however, the maxims of the Roman law arose out of the expediencies of urban government, "manifestly founded on reason, public convenience, and necessity,"[421] instead of upon one's liberty of individual conscience and freedom to associate and develop relationships with other men, as well as with God.

Herbert Broom, as much as any other common lawyer, has set forth the civil-law maxims consonant with the common-law tradition, showing where common-law courts have recognized the same principle. Because the common-law and the civil-law traditions disagree over the source of law, the common law often applies a given maxim different than does the civil-law. Further, common-law constrains the application of some maxims in ways civil-law systems do not.

For example, consider the civil law's application of the maxim, *No guilt attaches to a person who is compelled to obey* (*Ejus nulla culpaest bcui parere necesse sit*). In the civil-law tradition, obedience to the compelling force and command of the state is never a crime; even if the civil law contemplates a higher authority, in practice, it considers the state the highest authority. By contrast, in the common-law tradition,

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collection of such critical comments, Garner refers the reader to BRIAN A. GARNER, DICTIONARY OF MODERN LEGAL USAGE 552 (2d. ed. 1995).

[420] Brian A. Garner, *Appendix A: Legal Maxims*, *in* BLACK'S LAW DICTIONARY 1615 (7th ed. 1999).

[421] HERBERT BROOM OF THE INNER TEMPLE: BARRISTER-AT-LAW AND READER OF COMMON LAW IN THE INNS OF COURT, LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED ix (Philadelphia, T. & J.W. Johnson & Co. 1874).

"the command to commit a crime is void in law, and can protect neither the commander nor the instrument."[422] Common law limits the sovereignty of the state.

Understood in the civil-law tradition, the maxim, *No man shall be condemned unheard* (*Audi alterum Partem*: Hear the other party), does not include the common law's pervasive and controlling sense of due process. Understood in the common-law sense, however, this maxim is a first principle of common-law due process. "'The laws of God and man'," says Fortescue, J., in Dr. Bentley's case, "'both give the party an opportunity to make his defense, if he has any.' And immemorial custom cannot avail in contravention of this principle."[423] In the common-law tradition, a genuine opportunity to be heard is of such far-reaching application that it eludes definition. No decree, statute, or court can lawfuly deny its demands. In brief, our common-law courts recognize due process in the sense of fair play to be observed and applied case by case.

The maxim, *No man shall be judge in his own cause* (*Nemo debet esse Judex in propria sua Causa*), applies with vigor to both common law and government. In the civil-law tradition, however, the state judges its own causes, using its civil servants, according to its will. In a common-law court, however, if the judge has interest in the case he attempts to judge, whether for money, political ambition, vindictiveness, or otherwise, the common law renders him unfit to judge the cause:

> The maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause to which he is a party, but applies to a cause in which he has an interest . . . This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of laboring under such an influence.[424]

Consider the maxim, *That regard be had to the public welfare is the highest law* (*Salus populi suprema lex*: the safety of the people is the supreme law). Because the civil-law tradition is not as sensitive to limit the prerogatives of popular will, that which it deems the public right

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[422] *See id.* at 14, *quoting* 1 Hale, P.C. 44, 516.

[423] Williams v. Lord Bagot, 3 B. & C. 772 (10 E.C.L.R.), *quoted in id* at 114.

[424] H.L. Cas. 787, *citing* Y.B., Hen. 6, 19; 2 Roll. Abr. 93, *quoted in* HERBERT BROOM OF THE INNER TEMPLE: BARRISTER-AT-LAW AND READER OF COMMON LAW IN THE INNS OF COURT, LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED 117–18 (Philadelphia T. & J.W. Johnson & Co. 1874).

under this maxim is greater than in the common-law tradition.[425] Using case authority, Broom shows the common-law limits of this maxim's application in both England and the United States.

Further examples abound. Familiarity with a few legal maxims applied in keeping with the common-law tradition provides "the best and most authentic foundation of human laws."[426] Further, familiarity with such maxims is doable and encourages learning.[427] Moreover, maxims have staying power: they stick in the consciousness of a country—a good thing if such maxims are true. From ancient times, maxims having proven their ability to enter in a country's conscience and remain:

> Acute observers and thinkers, accustomed to generalize the facts of experience, and to reason from first principles were fond of clothing their results in striking apophthegms[[428]] conveying some instruction of witty reflection, some moral or religious truth, a maxim of worldly prudence and policy, or a practical rule of life. These were expressed in terms aptly chosen to awaken attention, or inquiry, and reflection, and in a form that fixed them indelibly in the memory. They thus became elements of the national and popular thought, as inseparable from the mental habits of a people as the power of perception itself.[429]

In summary, common lawyers disagree about the worth of civil-law legal maxims to the common-law tradition. William Blackstone and Herbert W. Broom put great stock in them; James Fitzjames Steven[430]

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[425] *See, e.g., id.* at 1–9. *See generally id.* at 11–21 (providing further discussion). The common-law tradition limits the public right. *See, e.g.*, "Takings Clause" U.S. CONST. amend. V.

[426] 1 BLACKSTONE, *supra* note 12, at 33.

[427] *See id.* at 31.

[428] An *apophthegm* is terse saying. Some of the following are well-known examples: "Too old too soon, too smart too late"; "Good fences make good neighbors"; "The apple never falls far from the tree"; "Brevity is the soul of wit"; "He who has the power to give, has also the power to take"; "Birds of a feather flock together"; "Where there's smoke, there's fire"; "No pancake is so thin that it doesn't have two sides"; "He who takes what isn't his'n, shall pay the price or go to prison"; "A promise made is a debt unpaid" (equating debt and contract); "Friendly gunfire isn't"; "He who pays the fiddler, calls the tune"; and "Gold is where you find it."

[429] MILTON S. TERRY, BIBLICAL HERMENEUTICS: A TREATISE ON THE INTERPRETATION OF THE OLD AND NEW TESTAMENTS 329 (photo. reprint, n.d.) (1898).

[430] 2 JAMES FITZJAMES STEVEN HISTORY OF THE CRIMINAL LAW IN ENGLAND 94 n.1 (1883), *quoted in* Brian A. Garner, *Appendix A: Legal Maxims*, *in* BLACK'S LAW DICTIONARY 1615 (7th ed. 1999).

and Brian Garner[431] do not. Broom demonstrates the consistency of some legal maxims with common-law precedents and with the opinions great common lawyers of the past. Broom, with Sir J. Macintosh, calls legal maxims "the condensed Good Sense of Nations." Though not inspired as are the *Proverbs* of the Old Testament,[432] Broom and Blackstone find a good many of the civil-law maxims consonant with the common-law tradition, so long as these are applied according to the common-law precept that the fountain of the law is not men and the state. Garner's view that civil law's maxims contain "an element of fun" and "sometimes express surprising insight," though true, relegates maxims to no applicable purpose. That Garner recognizes their worth is apparent, in that he dedicates eighty-seven pages to providing over 2000 maxims and includes sources that have compiled legal maxims.[433]

In conclusion, the maxims of the civil law are worth one's while as they help one to learn and retain the first principles of the common law. Through the centuries, the common law has adopted some of these. It is the trumping characteristic of the common law, says Blackstone, that "it succeeds everywhere in molding rules, whatever their origin, into accord with its principles in the face of formidable attempts to overthrow or supercede them." Civil-law maxims, where they comport with true principles, are most helpful, especially as a place of beginning one's consideration of a legal dispute.

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[431] BRIAN GARNER, A DICTIONARY OF MODERN LEGAL USAGE 52 (2d ed. 1995), *cited in id.*

[432] The ancient Hebrews were found of the *proverb*. The Old Testament use of the Hebrew term for "proverb" (משל: *mashal*) is comparable to our understanding of *maxim*: a wise and pithy saying. Further, however, the noun *mashal* in its verb form means "to liken" or "to contrast"; it also means "to rule." The Septuagint translates *mashal* with παροιμια (*paroimia*): an adage of a general principle; an old saying popularly accepted as true.

[433] The following sources, says Garner, provide and discuss legal maxims: WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 4 vols. (Chicago and London, Univ. of Chicago, reprint 1979) (1765); HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 4 vols. (G.E. Woodbine ed., S.E. Thorne trans., Cambridge, Harvard Univ. Press 1968); SIR EDWARD COKE, THE REPORTS OF SIR EDWARD COKE 6 vols. (J.H. Thomas & J.F. Fraser eds., London, Butterworth 1826); SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND OR A COMMENTARY UPON LITTLETON 2 vols. (New York and London, Garland, reprint 1979) (1628); SIR EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 4 vols. (Buffalo, William S. Hein, reprint 1986) (1797); THE DIGEST OF JUSTINIAN 4 vols. (T. Mommsen et al., Philadelphia, Univ. of Penn. 1985); and JUSTINIAN'S INSTITUTES (P. Krueger ed., P. Birks & G. McLeod trans., Ithaca, Cornell Univ. 1987)—all the foregoing *cited in* BLACK'S LAW DICTIONARY 1701 (7th ed. 1999).

Chapter Three

Common Law: Origin & Growth

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§ 3.1
Pre-Anglo-Saxon Britain

"In the end Rome gave the word and the legions sailed . . . [b]ut of Roman speech, Roman law, Roman institutions, hardly a vestige" remains. After Rome's departure, continental Europe viewed Britain as that Island "[f]ar in the West . . . severed from the world by the broad flood of barbarism, sorely beset, but defended by its mountains, a tiny Christian realm . . . [A]t Rome men remembered . . ." and coveted.[434]

THE Island of Great Britain covers about 89,000 square English (not Roman) miles: fewer square miles than that of Illinois and Indiana combined. England and Wales combined (without Scotland) cover only

[434] CHURCHILL, *supra* note 62, at xi–xii.

58,825 square English miles: 10,401 fewer than the State of Missouri's 69,226 square English miles.

Britain's first inhabitants were Iberians. At that time (*circa* 2300 B.C.), forests and swamps covered the Island; the Iberians, however, neither cleared the forests nor drained the swamps. In those days, according to legend, timber so thickly covered the entire Island that if a squirrel traveled from the north end of Britain to the south end, it need never touch the ground. From the seventh century through the third century B.C., Celtic tribes, by small but countless raids into the Island, overcame the Iberians, drove them to the mountainous fringes, then, over time, absorbed them. The Celtic tribes in Britain remained nomads, preferring herding to farming.

The law and government of the Celts, says Algernon Sidney, was near the same as that of the Anglo-Saxons and Danes, not only in general principles, but also in particulars. At bottom, though the Celts were Druid pagans, they nevertheless limited their kings. "Our British Druids," said Sadler, "would not speak about the state, but only about common counsels."[435] Then, during the Roman occupation of Britain, Greco-Roman hedonism weakened the fiber of the Celtic life and their common law. However, following Rome's pulling out, the arrival of the Anglo-Saxons enlivened and strengthened the common law—much as did the coming of the Danes, some 400 years later.

The ancient collection of unwritten maxims and customs, which we call the common law, has stood fast in England from earliest known times. The elements of these common laws trace to the ancient tribal customs of the Britons and Germans, as both Caesar[436] and Tacitus[437] have recorded. The common law of the northern nations on the Continent, and especially those of Anglo-Saxons and Danes in Britain, arose among them as the precepts of the Law of Nature and of Nature's God. "The British as well as the Gallic druids," says Blackstone, "committed all their laws as well as learning to memory; and it is [also] said of the primitive Saxons here, as well as their brethren on the Continent . . . ."

Indeed, the most-learned English common lawyers, such as Littleton, Fortescue, Coke, and Blackstone, insist with warm affection and on good evidence that the principled customs of common law and government are as old as the first Britons, and further, that loyalty to these has continued

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[435] John Sadler, The Rights of the Kingdom on the Customs of our Ancestors (1649). Sadler was a Puritan parliamentarian.

[436] About 58 B.C.

[437] About A.D. 98.

from thence, through England's several inhabitants, unchanged and unadulterated. The historians of early England agree that about A.D. 887, Alfred compiled his *Dome-Book*, containing the first principles of the common law—earlier called *Folcruhte* or "Folk-rule"—for the general use of the whole kingdom. The first ground and chief cornerstone of the laws of Britain, says Blackstone, are these immemorial customs of the common law:

> Sir Edward Coke . . . supposed the Common Law of England [alias Britain] and Scot-land [alias Scot-ic Ireland] . . . to have been originally the same . . . Old Common Law of both kingdoms . . . God, when He created matter and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion—so, when He created man and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.[438]

During the years 55–54 B.C., Julius Cæsar invaded Britain. After a brief stay, Cæsar and his legions withdrew, but by this foray, he gathered much intelligence and carried it to Rome. Then, in 43 B.C., emperor Claudius invaded Britain; within the next few years, Rome had conquered most of the southern portion of the Island. Using alliances and political maneuvering, the Roman occupation advanced north into the south of Scotland. The Island south of Scotland remained a Roman province until A.D. 407.

Neither the Iberians nor the Celts were town dwellers; thus, the Romans built the first towns, cities, and good roads in Britain. Around towns and settlements, the Romans organized villas: farms that produced food for the town dwellers. Except for a few Roman cities, such as Chester in the north of Wales and Carrion in the south of Wales, the sewers and roads the Romans built in Britain were inferior to those they had built in Spain and elsewhere. Though Rome built towns, roads,

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[438] 1 BLACKSTONE, *supra* note 12, at 17–95. This quote and the information of the two paragraphs previous to it are *taken from id.* Bracketed material within this quote *taken from* BARRISTER-AT-LAW AND REV. FRANCIS NIGEL LEE, COMMON LAW: ROOTS AND FRUITS, THE ROOTS OF COMMON LAW IN BIBLICAL, IRO-SCOTIC, BRYTHONIC & ENGLISH JURISPRUDENCE—AND SOME OF THEIR FRUITS IN GREAT BRITAIN, AND THE UNITED STATES AND AUSTRALIA *Preface* (1993) (1997). Lee's book gives nigh-near exhaustive treatment to the ancient origins of the common law.

bridges, and even sewage systems in Britain, Rome's presence was more of a relaxed occupation than domination. Unlike Rome's government on the European continent and on to the east and south around the Mediterranean, her civil law and rule in Britain remained loose.[439]

During Roman occupation, the Celts roamed Britain at will; the Romans treated them much the same as the United States government treated the American Indian tribes: if the Celts wanted to come and live under Rome's laws, the Romans welcomed them; if not, the Romans confined them to reservations. Offering Roman citizenship as enticement, Rome invited the Celts to serve in her military. Thus was the relationship between the Celts and Rome.

Rome kept three legions of regulars under arms in Britain, totaling about 15,000 men. In addition, Rome had 40,000 British auxiliary troops[440] available for quick muster. All told, therefore, Rome maintained about 55,000 troops in Britain against the constant threat of civil rebellions and coastal attacks of the Angels and Saxons. In A.D. 406, following the Visigothic invasion of the Roman Empire on the continent, Rome withdrew her legions from Britain to defend her frontiers. Then, sometime around A.D. 450, King Arthur—some believe a former Roman Legion Reserve officer—led the Celtic forces' last stand against the invading Anglo-Saxons. The tradition of Arthur's victory, if true, delayed the Anglo-Saxon's conquest of Britain by about fifty years.

§ 3.2
Anglo-Saxon Arrival in Britain

[The Anglo-Saxons] might vaguely admire the imperial [Roman] tradition. But they could not abide town life nor cope with the other problems the Roman type of government involved. So, . . . like the American settlers, they relied upon the methods with which they had been familiar in their former homes modifying them only to fit the new conditions.[441]

During the third century, the Anglo-Saxons began making random raids into Britain; during the fourth century, their raids became regular; then,

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[439] Throughout British history, Rome struggled to bring the Island under her civil law's domination and thereby gain a permanent economic grip; yet, she has never had decisive success.

[440] Rome's British auxiliary troops were akin, in concept, to the militia of the Second Amendment of the Constitution. *See* U.S. CONST. amend. II.

[441] M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 24 (1942).

after the turn of the fifth century, they sailed for Britain in successive waves with earnest intent to remain, bringing with them their Volkriht.[442]

In A.D. 406, Rome pulled her legions out of Britain to repel the Visigothic tribes pressing down upon her frontiers. In A.D. 407, Rome's legions now gone, the Anglo-Saxon raiders more and more invaded Britain, intending to settle. As Providence had it, their migration preserved the common law. "In the tribal conceptions of the Germanic nation lie, no doubt, many of those principles [of law and government] which are now admired . . . ."[443] Among these conceptions was a fundamental ideal of equal standing before the law. "The man of noble blood," writes Green of the Anglo-Saxons, "enjoyed no legal privilege amongst his fellows."[444]

In early Rome, idolatry had contorted her republican ideals and degenerated Roman law and government into an empire of fatalism and totalitarian dictatorship. Upon coming to Britain, however, the Anglo-Saxons' Volkriht, with its ideals of government limited by individual rights, had still never given way to their god of fate called *wyrd*.[445] Although, at that time, the Anglo-Saxons' practice of their ideals of law limiting government was waning.

Before coming to Britain, the Angels and Saxons had become migratory farmers in and about the area of Holstein: the lower peninsular region anciently known as Jutland,[446] now called Denmark. Typically, they worked an area of land until they exhausted it and then moved on; upon reaching Britain, however, the Anglo-Saxons were ready to settle on land, put down roots, develop and farm it. They never used, however, the country manor houses and other dwellings the Romans left in the *villas*, preferring log cabins with logs set vertical. The Anglo-Saxons held a natural aversion to three fundamentals of the Roman

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[442] *See id.* at 68–74. During these centuries, for reasons yet known, the Teutonic tribes burst forth with restless and uncontainable energy that continued past the Reformation and beyond, reaching into the New World and around the globe. The Visigoths flooded down into Rome, then after a few years left and conquered Spain; the Anglo-Saxons overwhelmed Britain; the Danish Vikings then, for a time, drove the Anglo-Saxons to Britain's fringes of mountains and moors; and the Normans invaded Britain, parts of France, Sicily and other parts of the East.

[443] CHURCHILL, *supra* note 62, at xi–xii.

[444] J.R. GREEN, SHORT HISTORY OF THE ENGLISH PEOPLE 4 (1874), *quoted in id.*

[445] Pronounced *veird*; often spelt *wyrd*.

[446] The Danes gave to English the word *jut* for "peninsula": a finger of land that juts out into a body of water. The early Danes called their peninsular home Jutland and their tribe the *Jutes*.

tradition of law and government: cities—towns to the modern observer—, bureaucratic expediency, and kings of unlimited power.[447]

In time, the Anglo-Saxons overran much of Britain, tried to exterminate the Celts, and—just as the Celts had before done to the Iberians and much as the British settlers later did to the North American Indian tribes—drove the remainder into the remote and rugged parts of the Island: the escarpments of Wales, the moors of Cornwall and Cumberland, and the highlands and lowlands of Scotland. In ancestry, the Angels and Saxons were not much different from the Celts, but spoke a different tongue. Whatever blood difference the Anglo-Saxon invaders arrived with in Britain, they and the Celts mixed more than is now aknowledged; time has further blended their blood and customs. [448]

The Celts, the Anglo-Saxons, and—as will be seen[449]—, the Danes all had traditions of law and government strikingly similar, not only in fundamentals, but also in particulars. The 400-year Roman occupation had weakened the Celts practice of their tradition of law and government; but the Anglo-Saxons, arriving with their folk law, practiced a like tradition to the Celts'. Then, in the seventh century, Rome's priesthood, using her civil-canon law, seduced much of the Anglo-Saxon Church; but, beginning about A.D. 875 and until just before the Norman invasion in A.D. 1066, the Jutes' Danelaw brought the Anglo-Saxons' law and government back to their foundations.

§ 3.2.1
Weird and Doom:
Anglo-Saxon Fate & Judgment

The common-law tradition neither emerged nor evolved from the Roman civil law. The foundations and development of these two traditions are wholly distinct, producing contrary forms of government and law, which foster constant conflict among nations. Roman civil law traces its roots to the settlement of Babylon. The common law traces its roots back to the Anglo-Saxon and Jute tribes, and beyond.

The Angels and Saxons called their early tribal law the *Volkriht*: translated by the letters, "folkright"; understood as "people's law" or "folk

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[447] M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 24 (1942).

[448] The ancient Roman historians speak often of the Jutes, Cimbri, Angels, and Saxons without distinguishing them. Augustus puts the Cimbri on the Danish peninsula in the first century with the Jutes. AUGUSTUS, RES GESTAE DIVI AUGUSTI chap. 26 (A.D. 14).

[449] See generally § 3.4 of this book (discussing the lasting influence of Danish language, law, and government in England).

law." Though called by different names, the Germanic, Scandinavian, and Celtic tribes were Teutons, holding in common the principles of the Volkriht; more particularly, for purposes of the English common law, the Volkriht tradition was the law of the early Angels,[450] the Saxons, the Jutes (Danes), and the Celts—all having migrated, at different times, from the continent. Though varying somewhat from place to place, the folk-law tradition among these three tribal groups shared not only basic properties, but also particulars.[451] Beginning with our present tradition of common law and government and tracing back, the folk law among the tribes in the north of Europe around the first century shows the visible properties that distinguish the common-law tradition from the civil law. Back of this time, the trace of evidence of the common-law fundamentals, though evincing, is less plentiful.

Wyrd was the Germanic-Nordic tribes' idea of fate; sometimes they referred to it as a principle or force; at other times, they spoke of wyrd as a person, having mind and will. Modern English has, by way of the Anglo-Saxons', kept the word *wyrd*, now spelt "weird." Since the term's coming to the British Isle over 1500 years ago, its basic meaning has persisted. To the pagan Anglo-Saxon, the power of wyrd was the power of arbitrary fate; he believed that wyrd's decree, called *dom* or *dome*, once made, was final.

The Anglo-Saxon's term dome, now spelt *doom*, remains one of the English words for the sentence of "judgment." Further, "doom" is

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[450] Taken into English, the pronunciation of the tribal name Angels or *Angles* has likely transmuted into "English." The Angels settled foremost in central Britain: from the River Thames thence north to the Scottish border. England came to call this region Mercia and the tongue of its inhabitants Mercian, Middle English, or Anglo-Saxon. Mercian became the trade language of merchants and sailors spoken in the port city of London. Because of its wider usage, Wyclif chose the Mercian dialect for his translation of the Bible, the first into an English tongue. Tyndale's translation was also largely Mercian, which carried over into the King James Version, which has shaped modern English.

The Saxons settled in the south and the east of Britain. Most likely, the *Angles* of Britain became the *English*; later, in the New World, the Indian tribes of New England mutated "English" into *Yankee*. Others, however, believe that *Yankee* is a loose pronunciation of the Dutch *Jan Kaas* (English, "John Cheese"): the New York Dutch settlers' disparaging name for the English settlers in Connecticut.

[451] As to law and government, all the Germanic tribes "had the like customs among them: the governments they had were so instituted." ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 102–03 (Indianapolis, Thomas G. West ed., 1990) (1698); BERMAN, *supra* note 9, at 52–68, 482–516. In support of Sidney's statement, the following ancient groups practiced trial by a jury of freeman—the common-law tradition's indispensable feature: the Gothic nations, the Franks, the Danes, the Anglo-Saxons, and the Scots and Picts. See generally G.H. HENTY, BERIC THE BRITON: A STORY OF THE ROMAN INVASION (Mill Hall Penn., Preston Speed 1996) (1892), for an historical fiction revealing the government forms and practices of the Celtic tribes at the time of Rome's invasion of Britain.

familiar to many in the names of two ancient English documents: the *Doomsday Book* (meaning, "judgment-day book"), which is William the Conqueror's census of population and property, taken in the year 1086; and the earlier *Dome Book* (meaning, "judgment book") of Alfred the Great, containing laws from the Bible, *Exodus* 21–23, the Sermon on the Mount, *Acts* 15, common-law principles, judicial forms, and criminal penalties. Unlike the *Doomsday Book*, no complete copy of Alfred's *Dome Book*[452] survives.

The Anglo-Saxon poem *Beowulf*[453]—written between the years A.D. 675 and 1000—provides a peek at the pagan Anglo-Saxon's and Danes' understanding of wyrd (fate) by balancing it against doom (judgment). "Fate [wyrd]," says Beowulf, "often saves an un-doomed [un-judged] man, if his courage is good."[454] According to *Beowulf*, salvation is possible only for the *un*-doomed: i.e., once fate (wyrd) has decreed judgment (doom), it was too late for salvation. Because wyrd's decrees or

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[452] "Dome Book" is from the Anglo-Saxon *dombec*, meaning "judgment book."

[453] *Beowulf* is the Anglo-Saxon and Dane word for the animal "bear," which they often saw raiding bees' nests' for honey. Because the animal also looked wolf-like, they called it "bee-wolf": *beo* (bee) and *wulf* (wolf). The Anglo-Saxon tongue was earthy and alive, thus, its power. The human body he called a *banhus* (bone-house) and the joint between bones a *banloca* (bone-lock). When a man opened his mouth to speak, he was said to have *wordhord onleoc* (unlocked his word-hoard), the sun he called the *woruldcandel* (world-candle), and snakes and reptiles he called *wyrmcynnes* (worm-kinds). *See* BILL COOPER, AFTER THE FLOOD 150 (1995).

[454] That is, "if he doughty be." *Beowulf*, ll., 572b–73. Though likely ignorant of the Christian Scriptures, Beowulf's understanding of *wyrd* (his word for the unknown) attributes its features to providence. The fuller passage reads as follows:

> Line 570—beorht beacen godes; brimu swaÝredon,
> Line 571—Ýæt ic sænæssas geseon mihte,
> Line 572—windige weallas. *Wyrd oft nere*
> Line 573—*unfægne eorl, Ýonne his ellen deah.*
> Line 574—HwæÝere me gesælde Ýæt ic mid sweorde ofsloh
> Line 575—niceras nigene. No ic on niht gefrægn
> Line 576—under heofones hwealf heardran feohtan

In *Beowulf*, though wyrd (*fate*) sometimes appears to exercise its own will, such is a personification of some divine will. For example, line 455b reads as though wyrd is a person: wyrd swa hio scel (*fate always goes as she shall*). However, lines 477b–79 read: "hie wyrd forsweop" (*their fate [was] swept away*) "on Grendles gryre" (*by Grendel's terror*). "God eaÝe mæg" (*God could easily*) "Ýone dolscea*an dæda getwæfan" (*hinder the deeds of the desperate foe*).

The narrator of *Beowulf* clinches the Norseman's understanding of wyrd in lines 1055–58. He says that the monstrous-evil Cainite, Grendel, would have killed more men, "except God in his wisdom, and the man's [Beowulf's] courageous wisdom had withstood *that wyrd* and him." Later, to the Christian Angels, Saxons, and Danes, fate met its master in the LORD. Centuries later, a man from Saxony made a like comment. Though Satan may be a devil, said Martin Luther, he is still God's devil, and must serve God's will for men at God's command.

dooms were from eternity past and unchanging, the individual had no choice but to accept wyrd's doom (*dom*). To the pagan Anglo-Saxon, fate's (wyrd's) decree (dom or doom) was an eternal and irreversible judgment, i.e., final and without appeal.

The pre-Christian Anglo-Saxon and Danish tribes of continental Europe worshiped fate (wyrd), which was, in their view, arbitrary and unpredictable. In short, they believed "*weird*-ness" controlled the destiny of the individual.[455] However, upon migrating to the Isle of Britain, these tribes learned of Jesus Christ. Indeed, as the foregoing lines from *Beowulf* show, salvation is available only to the *un*-doomed (*un*-judged). So also, the Bible taught the Anglo-Saxon that Christ saves the one doomed—that is, the one still in his sins and judged (doomed) already—by making him un-doomed—that is, by taking away his judgment.[456]

This truth of the Christian Scriptures took its life-giving effect upon Alfred, Anglo-Saxon king of Wessex and eventually upon England, replacing the hopelessness of fate. Following his faith in the Christ of Scripture, King Alfred stated, in his famous addition to his translation of

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[455] *See* BERMAN, *supra* note 9, at 49–84, for additional sources of information concerning Anglo-Saxon concepts of judgment. The writer has taken much of the information from this and the following two paragraphs of the above text from Berman's research. In modern times, some have reverted to the ancient Anglo-Saxons' sense of *dom*—pronounced "doom" in modern English—, which is fate: *things happen*, the saying goes; a fellow cannot do anything about it. The result is hopelessness.

[456] "The one not believing is *perfected in judgment* already . . . ." *John* 3:18 (emphasis added). In this verse, John uses the perfect aspect of the Greek verb *κρινο* (*krino*: "to decree" or "to pronounce judgment,") to create a mental snapshot of the entire process of weighing relevant evidence. He then emphasizes that once a person completes this judging process, his judgment exists *perpetually* in a finished state: there is nothing remaining possible that anyone can do to make His act of judgment closer to complete or permanent. Indeed, it is complete and stands perfected. In addition, the perfect verb form means, "[t]he point of completion is always antecedent to the time implied or stated . . . ." H.E. DANA AND JULIUS R. MANTEY, A MANUAL GRAMMAR OF THE GREEK NEW TESTAMENT 200 (1927). Therefore, God saves the individual *after* He has fully weighed the evidence and pronounced the final doom.

God has perfected His decree of judgment against each person; the unbelieving man is, therefore, "doomed." It is from this hopeless and helpless condition that God, through Christ, rescues the one willing. Where the individual Anglo-Saxon grasped this opportunity—rather, where it grasped him—, he claimed it. God rescues men from the irreversible and hopeless *dooms* of *wyrd*.

According to Luke, the detail-minded historian, John the apostle was *αγραματοι* (*agramatoi*: illiterate and without professional skills) and *ιδιωται* (*idiotai*: without public skills): John was not a man of influence by ways familiar to this world. *See Acts* 4:13. John's vocabulary was small—by this writer's count, John's first epistle uses a vocabulary of only 243 Greek terms, excluding conjunctions and particles defying direct translation. Nonetheless, John excelled: he got across his message better with his small vocabulary than have most men with vast linguistic reserves. John's creative and deft use of the Greek perfect tense (better called the perfect *aspect* of the Greek verb) exceeds that of other Greek writers.

Boethius: "I say, as do all Christian men, that it is a divine purpose that rules and not *wyrd* [fate]."[457]

§ 3.2.2
Brief of the
Anglo-Saxon Folk Law

Common law . . . based on Saxon customs,
molded by Norman lawyers, and jealous of foreign systems . . . .[458]

The coming of the written Word of God among the Anglo-Saxons in England brought a yearning to read and then to write. Reading loosed the individual from dependence upon others to search, learn, and discern for

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[457] J.S. CARDALE, KING ALFRED'S ANGLO-SAXON VERSION OF BOETHIUS 342–43 (London, William Pickering 1829). King Alfred's translation, §§ VII–VIII provides the Anglo-Saxon understanding of *wyrd*:

> Some philosophers say, however, that *wyrd* rules both the luckiness and unluckiness of every man. But I say, as all Christian men say, that divine providence [*godcunde*] rules over him and not fate. And I know that it decrees every thing very rightly. They think that everything that fulfills their desire is God. It is no wonder, for they are blinded by the darkness of their sins. But the divine providence [*godcunde*] understands every thing very rightly, though it seems to us, through our ignorance, that it goes wrongly.

Id. at 342–45. Alfred shows distrust of Greco-Roman academia.

Through sound inference premised upon Scripture, King Alfred understood that men use the concepts called *fate* and *chance* to avoid admitting their ignorance of the future and their inability to control it. Fate and chance, says W. Stanley Jevons, are mischaracterizations of human ignorance, which results from ignoring the omniscience of God. Chance, continues Jevons, is non-existent in God's universe because chance "cannot coexist with knowledge. In nature the happening of an event has been predetermined." W. STANLEY JEVONS, THE PRINCIPLES OF SCIENCE: A TREATISE ON LOGIC AND THE SCIENTIFIC METHOD 198 (New York, Dover 1958) (1873). Since the omniscient God knows all, nothing is left to *chance*: the realm of that which is unknown to man but never unknown to God.

Precise and immutable laws govern every action and reaction with an infinitely acute precision. If God chooses to suspend any of His physical laws, He has still not left the result to chance because God knows the outcome. Further, one does not rightly say that God is ignorant of the future and, therefore, must look into the future to see and learn. On the contrary, never was the time when God was ignorant of anything: God cannot learn, for He is omniscient. Moreover, God will never be surprised at any occurrence because nothing new can occur to the mind of the God who knows all things. *See id. See also generally* W. STANLEY JEVONS, ELEMENTARY LESSON IN LOGIC: DEDUCTIVE AND INDUCTIVE (n.p. 1965) (n.d.). Jevons makes his presentation in common sense, practical, in-depth, and yet concise terms. "Science," says Jevons, "arises from the discovery of Identity amidst Diversity." W. STANLEY JEVONS, THE PRINCIPLES OF SCIENCE: A TREATISE ON LOGIC AND THE SCIENTIFIC METHOD 1 (New York, Dover 1958) (1873) (capital letters in original).

[458] 6 ENCYCLOPAEDIA BRITANNICA, *supra* note 379, at 778.

himself from the Scriptures, the mind of God. Further, possession of the Scriptures encouraged writing, which enabled copying the Scriptures, translation, and wider publication.[459] Writing also enabled the compiling of *Lex Salica*—the earliest known written collection of Anglo-Saxon folk law—, issued on the European continent under King Clovis, following his trusting of Christ in A.D. 496.[460] About A.D. 865, Ethelbert, the Christian king of Kent, issued the earliest surviving collection of the Anglo-Saxon *Volkriht* (folk law) principles written and compiled in England.[461]

Basic to Ethelbert's early written gathering of Anglo-Saxon folk law is *bot*, signifying profit or benefit. More fitting, *bot* denoted damages for the victim of wrongdoing, or even for negligence, sometimes spelt *bote*, *bot*, or *boot*. Modern English "boot" and the phrase "to boot"—something more thrown in to sweeten a bargain—stems from the Anglo-Saxon *bot*. In past centuries, to own a pair of boots signified economic favor that most never knew. Only men of privilege and wealth owned and wore boots; thus, boots came to signify profit and honor. Even until recent times, to die without one's boots on (bootless) was mark of dying without *bot*: having lived a profitless life, without hope or benefit of remedy.

By requiring the wrongdoer's payment of bot for damages, the folk law intended him to right the wrong by making whole the one wronged. He thereby soothed his victim's passion for vengeance, which belongs to God alone.[462] Neither the Volkriht nor Scripture authorizes a prison system to punish or deter crime. Instead, the ancient folk law—as also Scripture[463]—hit the wrongdoer where it hurts (his moneybag) and, thus, provided a deterrent, while compensating the victim to boot.[464]

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[459] See generally § 3.3 of this book (discussing the Scripture's part in bringing stability to the common law and providing examples of early Celtic and Anglo-Saxon translators of the Scriptures).

[460] *See* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 76–79 (Ernest F. Henderson ed., 1912), *referred to in* BERMAN, *supra* note 9, at 63.

[461] Kent was a small but leading kingdom on the south bank of the mouth of the River Thames. Its chief town was Canterbury.

[462] *See Deuteronomy* 32:35, *Romans* 12:19. Compensation such as *bot* is a feature of God's law as given through Moses: a fair reckoning, not the exacting of revenge. God's standard entails a fair calculation (a reckoning) of the remedy for wrongdoing that returns the victim to his previous condition (status quo *ante*: his condition existing before the wrong against him occurred) by damages intended to dampen the injured party's hunger for revenge. See generally app. 21 of this book (contrasting reckoning with revenge).

[463] See, *e.g., Deuteronomy* 22:19, for reference to *amercement*: Law French, *estre à merci*, "to be at the mercy (of another)," so called because the fine imposed was arbitrary. The cognate Latin term *merces* signifies a payment. Amercement was a fine upon a public official, such as for example a sheriff, for failure to make return of a court ordered writ.

[464] In this respect, the ancient Anglo-Saxon pagans understood more than have some modern Christians concerning the fundamental nature of mankind. See generally app. 21 of

Another form of bot, the *wergyld* (man-price), was for wrongful death. Today the common law calls such payment a wrongful death indemnity. Again, the poem *Beowulf*[465] provides a look into the mind of the early Anglo-Saxon. Beowulf sets its story among early eighth century Anglo-Saxons, Danes, and Geats: a tribe in southern parts of modern Sweden. Beowulf helped the Danes by slaying a vile, monstrous, bloodthirsty Cainite[466] cannibal named Grendel, who for twelve years had haunted one of the Danes' great halls, seeking to kill and eat Danish warriors. However, after Beowulf killed Grendel, Grendel's mother, a monstrous hag, kidnapped and ate Aeschere, son of the Danish king. Grendel is said to be as was his ancestor, Cain, feuding with God and man, in his case the Danes. Thus, as was Cain, Grendel, bitter and vile, had estranged himself from all others. Consequently, the Danes never even hoped for Grendel to pay the *wergyld* (man-price) for his murders,[467] but, instead, settled in for the only alternative, the feud. In cases where the accused refused to pay the wergyld, the parties

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this book (discussing the faulty theology behind the American penitentiary system and its damaging results).

The modern system of penology, utilizing "the place of penance" or *penitentiary*, is a rather recent innovation, founded upon American soil by dominant Christian sects in Pennsylvania advocating a sincere and utopian (but mistaken), theology concerning the fundamental character of man. The regenerate and the unregenerate, however, by their common ability to discern, need not stay under illusions concerning the evil intents of men's hearts. The Christian, however, desiring to believe the best of others, sometimes neglects his ability to discern evil in others and, of more importance, in himself.

The unregenerate are wiser than are the sons of light in this respect, especially when dealing with their own kind: "[T]he sons [i.e., products] of this present age," says Christ, "are *much more shrewd* toward their own kind, than are the sons of light." *Luke* 16:8 (emphasis added). Luke couples the comparative form for "more" with '*υπερ* (*whopear*: over and above; Latin *super*; English "hyper"), resulting in "*much* more." One writer translates, "by far and away more shrewd." Jesus lays stress on the superior practical wisdom of the unregenerate to accept and make fitting response to the evil schemes of their own kind. These persons (sons of this present age) simply assume that all other men are as themselves (unreliable and even dangerous) and deal with them accordingly.

The most important conviction holding any man, said Shedd, is the conviction of his own sin. But reliance upon locking a man in a *place of penance* with a Bible and instructions to pray in order to produce conviction of sin ignores the indispensable, but nonetheless sovereign, role of the Holy Spirit in personal conviction of sin, genuine repentance, and regeneration. Nonetheless, such was the theory and purpose of the early penitentiary.

[465] *Beowulf* was written somewhere between the years A.D. 675 and 1000.

[466] *See Genesis* 4.

[467] *See* BEOWULF, ll. 154–58. Some charge that *Beowulf* is pre-Christian because all of its Scripture references are to the Old Testament, as though the theme of the Old Testament is contrary to the New Testament. On the contrary, Beowulf presents the Christian perspective. Hrothgar, king of the Danes, finds evil within man himself and sums up the failure awaiting the warrior who forgets that God is the fountain of all that he has and is. *See id.*, ll. 1700–82.

sometimes resorted to the *feud*. Grendel, having refused to pay any wergyld, forced the Danes to take up the feud against Grendel, or forebear his never-ending murders.

In all of the folk law, encouragement of right and discouragement of wrong was every person's duty. Law was a matter of common custom and duty pertaining to relationships, freely chosen and entered foremost by promise or *beotword*: a solemn statement of intention. Thus, the glue of the folk law was one's loyalty to another, according to one's promise and bolstering oath. By these bindings, tribes and kingdoms held together for the common good and the common defense. One's loyalty, according to the *beoword*, within the kindred and the war band, was the sinew holding together the tribe. In a word, not central power, but relationships freely entered, were utmost. One's discipline of self-government in keeping one's promises enabled fulfilling relationships and tribal life.

Further, there being no central controlling power, each person was a duty-bound keeper of the folk law, that is, to make sure fair play is followed, so that justice will be done. The early Anglo-Saxon looked not foremost to the state for justice. Indeed, if a king murdered the lord or thegn to which a freeman had sworn loyalty, the freeman was duty bound to kill that murderous king or, in the alternative, to accept the wergyld from him or his family in compensation to the murdered man's family. By this principle, a swineherd killed a West Saxon king for the king's murder of the swineherd's lord. No man was above the law. Christians encouraged payment and acceptance of the wergyld instead of killing the accused. If the accused was unable to pay the wergyld indemnity in response to the aggrieved's offer to accept it, his family or his lord were bound to pay it for him.

A fundamental character of the Anglo-Saxon tribes' Volkriht (folk law) was its adversarial character, as distinguished from the inquisitorial character of Babylon's civil-law systems. The Volkriht thrived on genuine quarrel joined in public view. Further, the folk law's vigor was in adversity, not experience alone. Only spirited engagement of parties under its customs of due process allowed its benefits. Later, the Normans replaced the Anglo-Saxons' feud and trial by ordeal with trial by battle: a well-regulated[468] contest of arms, most often concerning disputes over

[468] As in court battles today, *well-regulated* demands competent combatants, each lawyer having developed, by personal discipline, his barrister skills. Recognizing that no trial is fair if either, or both, lawyers are unskilled. In a word, without lawyer skills, the words will be less than sharp and the action less than quick, resulting in lack of due process and fair opportunity for exposure of truth. Thus, Bar associations have set for lawyers standards of competency. If a lawyer knows his level of personal disciple is wanting to the needs of his client, he must decline representation and, if available, refer him to competent

land rights.[469] Personal discipline in the rules of chivalry insured a fair contest between combatants.

From the rules governing trial by battle on the field, the common-law fashioned distinct rules governing battle by trial in the courtroom. For example, the rules of chivalry demanded personal service of one's challenge, giving notice of the time and place of the contest and a genuine opportunity to engage before any granting of victory by default. Likewise, common-law due process demands personal service of one's legal challenge, giving notice of the time and place of hearing, and a genuine opportunity to answer before granting of judgment by default. As was trial by battle, common-law litigation is a contest over fixing of facts so that the Jury can decide which party has the worthier claim. Thus, trial remains fact intensive in contrast to the civil-law tradition, which is code intensive. Over time, the Anglo-Saxon court battle became an oath-hurling contest, with oaths of words replacing blows of weapons. The modern common-law trial remains a contest of rival testimony[470] for the finding of facts.

The changeover was gradual, but trial by battle on the field gave way to battle by trial in the courthouse. On the field, it was battle under the chivalry's rules of fair play; when the contest entered the courtroom, battle under chivalry's principles of fair play it remained. Common law's reference to trial as a court battle testifies to the common law's adversarial origins. The common law demands a fair contest; being visible and audible, the trial better holds the interest of the public and the attention of the Jury. "It is the love of combat," says Wellman, "which

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counsel. Thus, "well-regulated" does not mean well ruled by another, but rather, well-ruled by one's self, i.e., self-disciplined to the task.

[469] See generally § 3.11.2 of this book (discussing dueling as a vestige of trial by battle in America's adversarial political tradition). After the Normans' invasion of 1066, the Anglo-Saxons outnumbered the Normans by at least 160 to 1. Because the Anglo-Saxons rejected the Normans' trial by battle (preferring their own trial by ordeal), only the few Normans on the Island (initially about 6000) would have considered trial by battle to settle personal disputes; of these, few would have had the stomach for it. After the Norman invasion, therefore, evidence of trial by battle is scarce. In 1818, Parliament, by formal act, ended common-law trial by battle. The Anglo-Saxons' trial by ordeal and the Normans' trial by battle were the common-law forms of final appeal, direct to God, following exhaustion of remedies in human courts.

[470] The common-law trial rests upon objective evidence and its interpretation; the weight the Jury accords to that evidence depends upon each juror's insight, or lack thereof, of the sworn testimony regarding that evidence. Thus, according to Illinois's Fourth Appellate District Judge Joseph Spitz (retired), a common-law trial is—in rough-and-ready terms—a swearing match. Lloyd Paul Stryker adds color to Judge Spitz's portrayal: the common-law "trial is still an ordeal by battle. For the broadsword there is the weight of evidence; for the battle-ax, the force of logic; for the sharp spear, the blazing gleam of truth; for the rapier, the quick and flashing knife of wit."

every man possesses that fashions the attention of the jury upon the progress of the trial."[471]

The common-law is adversarial, not only in the courtroom, but also in the operations of government. The common-law tradition of government pits the ambitions of men, one against the other, and by its checks and balances, it curbs the powers of government. Common-law government is thus limited, never total.

Ideally, in common-law legal battle, both combatants are self disciplined to the contest, the rules of engagement are fixed, the combatants engage, and where procedural and evidentiary disputes arise, the judge makes the calls. After each witness swears to facts under direct examination, the opposing party puts that testimony on the anvil and under the hammer of cross-examination.[472] Then each party, in summation, argues to the Jury his interpretation of the facts.

Because the common law is adversarial, the chief quality of the combatants is courage, which is borne of confidence arising only from self-disciplined respect for the law. A sincere common lawyer will hold steady in intrepidity—sometimes rising to the standard, at other times faltering—, always pursuing the common-law standard: courage by self discipline in the face of unscrupulous legal opponents, unsympathetic or even biased and vindictive judges, misguided popular opinion, and the disdain of the legal profession, the government, and even friends. Those having felt the uncertainty of trial, where one's life, liberty, or property[473] hangs in the balance, know the common law's adversarial soul—seen, for example, in witness bushwhacking. The common law, says Wigmore, is an adversarial tradition of battle by trial[474] because it "originated in the community of . . . chivalrous behavior."

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[471] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 14 (New York, Dorset Press 1986) (1903).

[472] See generally § 5.1.5.4 of this book (providing, in brief, the history and unique character of cross-examination as a creature of the common-law tradition).

[473] See generally app. 14 of this book (discussing the meaning and importance of individual property rights as held by the common-law tradition).

[474] Recognizing the indispensable adversarial character of our common-law, Justice Joseph Story fashions battle advice into poetic verse for those engaging in battle by trial:

> What worth a hundred posts all maintained with skill,
> But these all held the foe is victor still.
>
> He who would win his cause, with power must frame
> points of support and look with steady aim:
> attack their weak points, defend your strong with art;
> strike but few blows, but strike them to the heart.

GEORGE ROSSMAN, ADVOCACY AND THE KING'S ENGLISH v (1960).

§ 3.2.3
The Anglo-Saxon Farming Village

The Anglo-Saxons' farming villages functioned in England until the nineteenth century, raising crops and livestock in the open fields around their villages and using the *champagne* system described below.[475] The Anglo-Saxons called their village chief the *thegn*; he lived with the village guards in the village's main dwelling known as the *hall*. After the Norman invasion of 1066, the French term "baron" replaced the Anglo-Dane's term *thegn*; today the English call him "the lord of the manor." The *moot place* was an area with cottages and individual lots, where villagers kept personal and family gardens.[476] About their villages lay fields, each measuring 660 feet by 160 feet.[477] The *thegn* retained from those working the land one-third of the harvest to feed the guard and their families; he never worked the fields but tended to managerial problems. The villagers chose from among their number a field master, bearing the title *reeve*.[478]

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[475] See generally § 3.2.3.1 of this book (describing the champagne system of farming and comparing it to the bochce system).

[476] The Puritan fathers carried the *moot place* into New England as the *acre right*: a land-holder's share in common lands outside a town or village, calculated in exact proportion to each landholder's salable land within that town or village.

[477] Each field of the farming village was 40 by 9.666 rods or 2.424242 . . . acres. An acre is 43,560 square feet or, as originally calculated, 660 (a furlong) by 66 feet (a chain). One rod equals 16.5 feet. Therefore, forty rods equals 660 feet, which is one furlong or one eighth of a mile (220 yards). Four rods equals one chain or 66 feet. Using a quarter-mile through, an acre is 1320 by 33 feet, or 80 by 2 rods. Therefore, a strip of land one-rod wide and a half-mile long (160 rods) equals one acre. These lengths and widths of measurement remain fundamental in dividing real property in common-law countries, especially for farming and mining lands. For example, standard placer mining claims are 1320 feet (two furlongs) by 660 feet (one furlong) or 20 acres.

Requiring only fixed landmarks, the ancient metes and bounds method of land description has remained a difficult method upon which to improve. The surveyor, starting from a fixed landmark (point of beginning), describing angles and distances, and using other fixed landmarks as reference points where convenient, delineates the boundaries of the parcel. Using the metes and bounds method, the description will end at the point of beginning, forming the closing of a geometric figure that marks the territorial limits of the property. Where convenient, the metes and bounds method of land description is still used. See generally § 5.1.6 of this book (providing the basic reason for the differences in the English and the metric systems of measurement and giving examples).

[478] The Anglo-Saxon term *reeve* signifies the one acting in the authority of another as an agent. In the Anglo-Saxon farming villages, the villagers of each *hundred* elected their reeve to act in the authority of the thegn. Later, after the Norman Conquest, the reeve of the shire (shire-reeve or *sheriff*) received appointment from the king and acted in the authority of the king. *See* MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 174–75 (1936). The local American counties, however, have returned in principle to the custom of the Anglo-Saxon local neighborhoods, each county electing their county sheriff to act as an agent of (in the authority of) the law.

The village priest was a warrior: a man of arms. The reader will recall that Friar Tuck, fellow patriot of Robin Hood of Loxley,[479] filled the role of village priest[480] and was a dangerous swordsman.[481] Moreover, the village priest was the chief of spiritual warfare, charged with protecting the village against the wiles of the devil.[482] In medieval days, the English considered females a point of weakness[483] often targeted by demons (fallen angels) as a channel for breaching the peace of the village. To the medieval Anglo-Saxon, neither demons nor their wiles were imaginary.

Without any cities depending on them for food, the Anglo-Saxon villagers lived internally: their village was their world; they knew nothing of commerce or money. As time went on after the Norman Conquest of 1066, however, English farming, through efficient, began contributing to the support of towns and small-city populations. Especially before the Norman Conquest, but also to a measure after it, the Anglo-Saxon

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[479] The writings of medieval monks provide the only source of reliable information concerning Robin Hood of Loxley. His legend reveals something of the authority structure of early Norman common law. For example, Robin of Loxley's conflict arose directly with the Sheriff (*shire-reeve*) of Nottingham Shire, but indirectly with King John. Being land-based, the Anglo-Saxons had lodged government power and tax collection at the local shire (county) level; there it remained through and after the Norman Conquest. The Anglo-Saxon tradition of local county administration of land recordation and taxation remains a fundamental characteristic of the American tradition of law and government.

[480] Though Friar Tuck was a mere friar, he likely filled the priestly function. Friars were not the equivalent of priests, but upon King John's troubles betokening Magna Carta and its threat of to papal power in the twelfth century, Rome made official the commission of friars to compete with parish priests by also performing sacerdotal functions, such as hearing confessions and giving absolution. Friars "were transformed into the pope's private army." BOBRICK, *supra* note 316, at 35.

After 1321, pursuant to a bull by pope John XXII, friars received official leave "to exercise any sacerdotal function in any parish, and as such, began to compete with the parish priest." *Id.* Friars (from Old French *frere*: "brother") are distinguished from monks in that monks shut themselves off from the world to perform their office within the seclusion of monasteries, whereas friars left their local headquarters (called *friaries*) to perform their office outside the walls of monastic seclusion. *See* J.D. DOUGLAS, DICTIONARY OF THE CHRISTIAN CHURCH 393 (J.D. Douglas ed., 1978).

[481] The difference between the medieval role of men of the cloth and the present view of clergy is vast. For example, William the Conqueror's half brother, a priest, distinguished himself at the Battle of Hastings in 1066 wielding a heavy mace. In order, however, to avoid violation of the law then in force forbidding priests to strike another man with a *spiked* weapon, he had his mace specially fashioned with a flat, smooth face. This example also reveals the level of legalism practiced by Rome's priests.

[482] *See, e.g., Ephesians* 6:11.

[483] *See generally* JAMES FRAZER, THE GOLDEN BOUGH: A STUDY IN COMPARATIVE RELIGION (London, MacMillan 1981) (1890) (discussing, comparing, and contrasting witchcraft and related subjects among different peoples worldwide, including European nations). See also generally ROBERT GRAVES, WHITE GODDESS 1948, for Grave's musings concerning ancient references to witchcraft in the British Isles. See also generally § 3.10.1 of this book (discussing witchcraft and its outbreak in New England, during the seventeenth-century Salem witchcraft trials).

farming village fulfilled its purpose: support of itself, and in so doing, it also supported England; for almost all of England's people lived in her farming villages.[484]

The few surviving manorial records afford a view of life in the medieval Anglo-Saxon farming village. The typical Anglo-Saxon villager was born, lived, and died in his village. Because available manorial records seldom list slaves, women, children, and soldiers hired by the thegn,[485] village population was greater than these records reveal. Though the Anglo-Saxons never took an entire census of England, fifteen years following the Norman Conquest, William I. conducted the *Doomsday Survey* of 1081, recording the following findings: twelve percent of the rural population were freemen,[486] thirty-eight percent were villeins,[487] thirty-two percent were cottiers,[488] and nine percent were slaves—those having no legally cognizable rights.[489]

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[484] Though using modern machinery, herbicides, and fertilizers, the Russian communal farms nevertheless failed to reach their goal: harvest enough for Russia's needs. Comparing the Russian communal farm with the Anglo-Saxons farming village highlights the reasons for the success of the Anglo-Saxons' farms and the failure of Russian agriculture. The Russians failed to consider three differences between their attempts at communal agriculture and the Anglo-Saxons' methods.

First, unlike the Anglo-Saxons, the Russians intended their communal farms to provide for the non-producing city dwellers. *Second*, in the Russian communist state, all surplus and profit went to the state; but under Anglo-Saxon custom, if the farm produced a surplus, the lord of the manor, or *thegn*, shared the profits with the tenants, thus motivating the Anglo-Saxon farmers to produce more surplus. At bottom, the Russian commune farmers were without motive to produce a surplus because the Russian state took all profits. *Third*, the *thegns* and guards donated their time to hunting, which contributed substantially to the protein supply of all in their neighborhood.

Because the Russians never addressed or otherwise compensated for these differences, Russians have complained about food shortages since the Revolution of 1917. Upon the fall of communist Russia and its satellites, the United States, from its agricultural surplus, did an airlift of food to the newly established Russian states in order to alleviate starvation.

[485] *See* 68 A.B.A.J. 442 (1982).

[486] The common law called the one holding a right in land greater than that of a serf, a *freeholder*.

[487] *See* BLACK'S LAW DICTIONARY 1563 (7th ed. 1999). The law annexed the villein to the land and placed him under obedience to the *thegn*. The one to whom he owed his obedience, therefore, depended upon the parcel of land to which the law attached him. His ever-so-small right arose out of his relationship to property and not because another of greater political status granted it to him. No man having granted his right; no man had right to take it.

Known as a *serf*, the villein was not a slave because the law of custom forbade his master from selling him without selling the land to which he attached. Further, a serf's attachment to a particular piece of land was permanent. A serf, therefore, acquired a new master only if the owner of the land, to which the law attached the serf, sold the parcel to another. Thus, the law limited what a landowner could do to a villein; the villein had the right to demand that others observe these limitations.

In the year 1081, the total population of England—the southern two thirds of the British Island—was about 1,250,000 souls. Of this number, only about 200,000 were freemen and only about 6000 were Norman invaders. By contrast, over 60,000,000 persons now reside in England. The Doomsday Survey shows that fifteen years after the Norman Conquest, villeins, cottiers, and slaves made up seventy-nine percent of England's 1,250,000 people.

Further, William's Doomsday Survey reveals that the farming villages—the foundation of the Anglo-Saxon's law and government—remained unaltered by the shock of the Norman invasion and the following fifteen years of Norman occupation. In fact, the still-vibrant local government of the Anglo-Saxon farming villages enabled William to collect the information necessary for the Doomsday Book. Further, the survival of the Anglo-Saxons' counties, sheriffs, and courts between 1066 and the Doomsday Survey of 1081, enabled William to call out each local county militia during those years.

In the days around the Norman Conquest, a slave in England is rightly defined—as he is in all ages and localities where slavery is tolerated—as a non-juristic person: a mere chattel, devoid of any rights the law recognized. By the eleventh century, slavery in England had all but died out for two reasons: slaves were unprofitable to keep over the idle winter months and slaves had no encouragement to work; consequently, they spent much time working at getting out of work—the sign and result of dependency. Significantly, the English courts have never found binding precedent for slavery on British soil.[490]

§ 3.2.3.1
Anglo-Saxon Land Use Custom

England's land-based farming setting nurtured the common-law tradition. The common law of real property is fundamental to

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[488] A *cottier* was a serf one level below a villein, but still not as low as a slave because just as the villein, he retained one legally cognizable right under law: the law barred anyone from separating him, against his will, from the land he worked.

[489] Put another way, the law protected no rights of the slave because he had no right the law recognized.

[490] Though slavery existed in England, no sanction in law has been found justifying slavery on English soil. In his prejudgment remarks in *Somersett*, Lord Mansfield stated that no precedent is found in the common law for slavery on English soil, regardless of whether Somersett was "a slave according to American law . . . We cannot at any of these points direct the law; the law must rule us . . . ." Lord Mansfield then found, "The state of slavery . . . is so odious, that nothing can be suffered to support it, but positive law."

understanding the common-law, and early Anglo-Saxon land use customs are the basis for understanding the common law of real property. Further, the common law of real property is about rights in land; these first principles of rights are foundational to the entire common-law view of rights in general.[491] In a word, the common law rests upon its strong sense of individual rights in property; which translates into property in rights. Due to its uncommon development, the common law of property in general, and real property in particular, is unique; the civil-law tradition has nothing comparable. Its genius springs from history's providence. Thus dependent upon history, "a page of history is worth volumes of logic."[492]

From *circa* 1050 to 1850, farmers in England used the *bochce* (low-woodland) and *champagne* (open-field) methods of tillable land use. The *bochce* or closed-field method suited acreage where drainage was difficult such as in Wales, Cornwall, and Devonshire. Laborers dug ditches around the fields and then planted hedgerows upon the ridges made by these diggings.[493] By custom of the bochce method, a single family owned and worked a parcel of land, and lived in a house on the land they worked—not in any nearby village. The bochce arrangement resembled the family farms of the American Midwest, but differed in that the custom of the Anglo-Saxons included more members of the extended family on each farm.

The *champagne* or open-field method prevailed in the valleys of Spain, France, Denmark, and Russia and dominated among the Anglo-Saxons in central England, from the North Sea Coast to the English Channel. Using the champagne method, several Anglo-Saxon families combined their labor into a gang or work crew, which worked together for the good of the families contributing to the crew.

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[491] See generally app. 14 of this book (discussing rights in property as *property in rights*). Liberty gives life meaning; liberty also provides opportunity for expression through the property of rights, such as free speech. "You can't have a liberty," said Margaret Thatcher, "without private property; you just can't."

[492] New York Trust Co. v. Eisner, 256 U.S. 345 (1921): "Upon this point a page of history is worth volumes of logic."

[493] Such ditches and hedgerows in Normandy hampered the American invasion during World War II by slowing the progress of armored war machines and by providing cover for the enemy. These hedgerows still exist in Normandy. In the American Midwest, east of the Great Plains, settlers continued to use hedgerows because their thick growth formed permanent fences for livestock containment. Most hedgerows in the Midwest were of Osage Orange (called *hedge*), the American Indian's material of choice for bow making. Because the wood tightly knits its grain and, therefore, is almost impenetrable by moisture or insects, hedge was also the farmer's wood of choice for making fence posts. Others claim that placing the large heavy hedge apples under one's house, drives out spiders.

Earlier, as migratory tribes, Anglo-Saxon men were hunters and warriors; women and children performed herding and gardening. Later, the migratory Anglo-Saxons settled into farming villages; though the men farmed the land, they nevertheless remained warriors because hostile bands were an ongoing threat, always afoot. Thus, while working the fields, men remained watchful and ever ready under arms to keep aggressors from overcoming them by surprise. By quickly engaging and occupying attackers, those on watch under arms afforded the ploughmen time to gather their weapons and join the fight. Most of the men did field work; though all men were prepared to take part in defense, only a small minority gave constant attention to the arts fighting and soldiering, in order to guide others in able protection of their neighborhoods against marauding bands and wild animals.[494]

Early on, the Anglo-Saxons used a two-field method of crop rotation; by the time of the Norman invasion of 1066, they had developed their two-field method into a three-field rotation method. Under the three-field method, each year the tenant put two of three fields in crops, while letting the third lay fallow to allow the soil rest and rejuvenation.[495]

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[494] The *kibbutz* of Israel is a modern example of a like arrangement with like problems: it is mildly communal and must maintain armed men on watch at all times to guard against marauders.

[495] The Anglo-Saxons' two-field and three-field methods of crop rotation were similar to the Hebrew practice, which required farmland to lay fallow one of every seven years. Thus the land use tradition's of both peoples required land to lay fallow at established intervals, allowing soil rejuvenation, but differed in that Scripture required all Hebrews to put all their land to fallow in the same year, every seven years. *See Leviticus* 25:1–7.

The Israelites' failure to do so over a span of 490 years brought their 70-year captivity in Babylon: the exact number of Scripture-required fallow years they had ignored during that 490 years. See generally *Leviticus* 26:34–35, 43, for God's standard requiring Israel to allow farmland, orchards, and vineyards to lay fallow one of every seven years and God's detailed method of righting Israel's failure to obey. See also generally *Jeremiah* 25: 9, 11–12, for God's decree that He will correct Israel's 490-year neglect of God's requirement to allow farmland, orchards, and vineyards to lay fallow one of every seven years. See in addition generally 2 *Chronicles* 36:21, for God's certification that He has fully righted Israel's neglect of His standard requiring farmland, orchards, and vineyards to lay fallow.

God has bestowed each person with dominion and requisite authority to care for the land allotted to him, never according to any man's own fancy, but according to the first principles of God's Word written, his act of obedience being accompanied with *common sense*: that sense gotten by experience and tested against God's Word written for consonance. *See Genesis* 1:28. Allowing land to lay fallow never forbids taking grains from the fields, fruits and nuts from the orchards, or grapes from the vineyards. Rather, it means that in the seventh (Hebrew שבת: *sabbath*, meaning "seven" or "satisfaction") year, no one is to plough, harrow, plant, sow, or otherwise till the ground, trim fruit tress or prune vineyards. That year, the husbandman is to *let go* the land, allowing it to grow and produce "of its own accord." *Leviticus* 25:5. He is to leave the volunteer harvest standing in the field, the fruit hanging on the trees, and the grapes hanging from the vine. Thus, when the standing harvest goes down—stalks, stems, tares, weeds, and seed—and the ripened fruit and grapes fall to the ground, these will enrich, sustaining and increasing the land's yield.

Typically, on any given three contiguous fields, villagers sowed the first tract to winter wheat; planted the second tract in oats, lentils, peas, and barley; and let the third tract lay fallow. Meadowland was set aside for raising hay to feed draft animals through the winter months.

The three-field crop rotation yielded more than the two-field rotation. Moreover, it produced a surplus, the two-field method never did. Medieval manor records reveal that in an average year, two bushels of wheat seed yielded about ten bushels of wheat—a fivefold increase. After providing for the villagers' needs, however, this meager increase left only a small surplus for trade, commerce, and support of towns. Because the farming villages' harvest of food lacked enough to support a non-producing city population, during their rule of the Island the Anglo-Saxons[496] never built cities. Before the Norman Conquest of 1066, the Anglo-Saxon farming villages controlled England; neither city dwellers, nor merchants, nor nomads lived in England, but only villagers of the farming neighborhoods.

Those tilling the fields used a two-bottomed ploughing rig, requiring an eight-ox team and ten men to operate it. Each man provided either an ox, part of the plough's gangs, or a yoke, and carried out a designated task on the rig as it ploughed.[497] The two-bottomed rig ploughed up to

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[496] By the time of the Norman Conquest, the Anglo-Saxons in England included those called Anglo-Danes—the Anglos, Saxons, and Danes, by that time, had largely become one in blood and tradition. Therefore, the writer, when referring to the Anglo-Saxon law and people after the Jute invasions (about A.D. 860–900), includes the Danes. See generally § 3.4 of this book (discussing the amalgamation of the Danes' language and law with that of the Anglo-Saxons' in England).

[497] In 1 *Kings* 19:19, Scripture records an example of a large ploughing rig also attended by a crew of men, as was the Anglo-Saxons'. Elijah found Elisha working as a member of a ploughing rig crew comprising twelve yoke of oxen (24 head). That Elisha was one of a crew of men attending this rig as it operated is apparent because the text states that Elisha's responsibility lay with the twelfth yoke, situated behind the other eleven yoke and, thus, nearest the plough gangs, to which attached the maul boards. Because most men were right handed, each teamster walked to the left of the oxen yoke as both teamster and oxen faced forward. The teamster, therefore, held the prodding stick or whip in his right hand, the hand closest to the ox team. Because the oxen grew accustom to the teamster's position, varying his position confused the oxen. The Anglo-Saxons called the ox of the yoked team nearest the teamster the *near ox* and the yoked ox farthest of from the teamster they called the *off ox*—this animal being farther *off* from the teamster). Thus the American sayings: "I would not know him *from Adam*"; or for greater emphasis, "from Adam's ox"; and for greatest emphasis, "from Adam's *off ox*."

Magna Carta recognizes the components of such plough rigs, reminding us of a much-eroded common-law principle, which now begs re-expression. According to Magna Carta, just as the common law entitled Anglo-Saxon nobles (*athelings*) to trial by a jury of other nobles (peers), that same law entitled farmers and ploughman to trial by a jury of "honest men of the[ir] neighborhood," that is, their neighbors of farmers and ploughmen. Further, Magna Carta recognized the Jury's authority to allow deprivation of a farmer's goods if his crime was great enough; but the common law barred the Jury from ever authorizing the

ten acres per day. Further, since the fields of those on the ploughing rig's crew adjoined, the crew members ploughed their separate fields together, as though one field, by a single continuous pass called a *through*: a complete pass of the ploughing rig, cutting a swath from one end of the adjoining fields to the other.

For example, farmers of the American Midwest and West talk of quarter-mile and half-mile throughs, depending upon the distance from one end of the field to the other. A *through*, then, is a single pass through the length of the field in one direction. A *'round*, however, is one complete "through" followed by a turning *'round* and coming back in the opposite direction. For the ten-man ploughing crew to turn its rig of two gangs, two bottoms, and eight oxen was cumbersome, consuming time better-spent ploughing. The crew, by ploughing adjoining fields as one field, had longer throughs, required less 'rounds, and consequently consumed less time, at least by half, in turning their rig around.[498] The villagers, therefore, combined contiguous fields for tilling; and thus ploughed and harrowed any particular adjoining fields in the direction allowing the longest through—good drainage allowing. Though villagers

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taking of his *waynage*: his plough tackle and ox team (also *waynagium*: from the Anglo-Saxon *wayn*, "to plough"). Thus, the Jury—and certainly not the government—has not authority to deprive any man, even though a man stands condemned of high crime, of his natural right to *make a living*. *See* MAGNA CARTA ch. 20.

Concerning this clause of Magna Carta, England distinguished between *having a living* (being on the government's payroll: dependant on government, such as a priest) and *making a living* (depending on Providence and one's diligence). Moreover, the common-law tradition has never recognized a right to *have a living*: government largess is no one's right. Common law does recognize, however, the natural right to *make a living*. Thus, common law forbids the Jury from allowing the government to destroy or attempt to destroy, in fact, that which enables a man to make his living; whether, for example, his waynage, his carpenter tools, his trade manuals, his clients, his operating accounts, his mailing lists, or his reputation—unless these are proven instruments of his crime.

Nowadays, in criminal prosecutions, but in derogation of common-law rights, federal prosecutors have developed techniques and schemes used before trial and conviction that work to deprive the accused from making his living so that he can maintain food and shelter for his family, much less retain effective legal counsel for his defense—also a fundamental right. By these devices, prosecutors mean to break the will of the accused to exercise lawful resistance, also a fundamental right. By example of contrast, in keeping with common-law first principles, U.S. Grant included in the terms of surrender at Appomattox that Confederate troops keep their horses for spring ploughing.

[498] Our term *furlong* stems from the Anglo-Saxon *furh* (furrow) and *lang* (long), originally signifying the long-ploughed furrow resulting from combining fields to enable a longer "through." The Anglo-Saxons ploughed their fields in long furrows (furlongs) because turning an eight to ten-oxen team pulling a heavy and clumsy plough rig was difficult and time consuming. In addition, the Anglo-Saxon's basic measurement of land area originated from their practice of combining strips of land into long throughs. The acre is still one furlong (660 feet) in length and one chain (66 feet) wide. Thus, the Anglo-Saxons called the furlong an "acre's length," though nowadays an acre is any shape of land area amounting to 43,560 square feet (660 by 66 feet).

ploughed and harvested together, in between ploughing and harvest they planted and tended their individual fields apart, each tenant minding his own ground.

Each year in the Anglo-Saxons' farming villages, the thegns reallocated strips of land to individual villagers of a given class. Listed in descending order of status, villagers consisted of four classes: freemen, villeins, cottiers, and slaves. The standard holding of a freeman—this included the village priest—was one *hide*, which, though varying early on from location to location, came to embrace 160 acres, thereabouts. The hide, therefore, approximated our modern quarter section of land, with a full section being 640 acres or one-mile square. One hide, therefore, was *a half*-mile square[499] or a quarter section: the approximate amount of land that a two-bottomed plough team of eight oxen could plough, while leaving time enough to plant a crop and allowing a full growing season, at England's range of longitude.[500]

The standard holding of a villein was a virgate, equaling forty acres.[501] The virgate, therefore, was a quarter-mile square, or a quarter of a quarter section. The cottier usually owned his cottage and five acres of arable land. Having no land in the common field to tend, cottiers used their time working as tradesmen—blacksmiths, carpenters, and thatchers—, filling needs that those occupied with more land were unable to fill. Though most Anglo-Saxons lived where the *champagne* method was fitting, and therefore, tended to live together in villages, it was customary for each family of freemen, villeins, and cottiers to maintain its own garden. English settlers carried this custom into rural North America, as many today recall. Slaves owned no land, being fortunate if they had a hut to sleep in during bad weather.

After harvest of crops from the fields and of hay from the meadows, villagers used the meadows in common for pasturing stock. Customarily,

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[499] It bears explaining that a half-mile square is one quarter of a mile square. Some readers have attempted to correct the writer on this point, insisting that a half-mile square is one half of a mile square. The matter becomes clear, however, by drawing a simple square (viz., a closed figure of four equal sides), with each side representing one mile. By drawing two lines across the interior of the square that cut it into four equal quarters, it will become apparent that a quarter section is indeed a half-mile square.

[500] The *hide*, though initially varying according to local standards—from as little as 30 acres to as great as 120 acres—came to present the standard of 160 acres (160 rods square), the standard allotment for a freeman and remains a fundamental unit of the English system of land survey: the quarter section. President Lincoln recommended the quarter section of land for the standard claim under the Homestead Act of 1862. See generally § 3.4 of this book (discussing how the *hide* originated among the Danes in England).

[501] Old Anglo-Saxon called this 40-acre parcel a *geirdland*, meaning "yardland": a 440-yard (80-rod) square.

with the exception of those singled out for breeding stock, they slaughtered yearling cattle in the fall because hay was often in short supply.[502] The land surrounding the manor house they called *waste*. As a matter of legal title, the thegn held the waste, but all the villagers used it for pasturing sheep and hogs[503] and thegns were generous in granting easements across it. When the English began to build cities, determining easement rights across these manor wastes became problematic. Some thegns, having granted hundreds of easements across their waste, created legal problems for their successors in interest, which urban sprawl now aggravates.[504]

§ 3.2.3.2
Serfdom:
Villeins & Cottiers

[O]ne may be a villein in England, but not a slave.[505]

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[502] The wherewithal to feed livestock through the winter months remains an ongoing problem among stockmen. Over forty years ago, the writer knew of those who, for the same reason, leased bulls out to others through the winter. The lessor got the benefit of spring calves; the lessee, not wanting calves, got the benefit of his lessor paying for winter-feed.

[503] Such open land of pasture rights which neighbors held in common, the Anglo-Saxons called commons, common waste, wasteland, or just *waste*. Americans later called land used in common rangeland, open range, or just *range*. By a similar custom, after harvest and until spring ploughing, as late as the decade of 1960–1970 in some parts of the Alabama and Mississippi, after fall harvest, farmers opened their farmland to free range for the neighborhood's hogs and cattle. The Anglo-Saxon's early words for "waste" were *vast* and *wüst* (pronounced "vüst"), meaning "wide and long"—as is an open range.

The German *wüst* has retained its sense, meaning land, though un-tillable, fit for light use such as grazing and volunteer hay grasses. Martin Luther chose this Germanic root for his translation of *Proverbs* 29:18, which reads in English, "Where there is no word from God [חזון (*chazon*): prophetic insight], *the people perish*." This last phrase, Luther translates from Hebrew with the German, *das Volk wild und wüst*. *Wild* means the people are wild, wide, naked, empty, and desolate; *wüst* means they are as a wasteland, being good only for light use. *Proverbs* 29:18, *translated from the Hebrew in* DIE BIBLE: NACH DER ÜBERSETZUNG MARTIN LUTHERS. The modern sense of the German *wild und wüst* sums up in the English words *destructive and worth little*.

[504] *See* 2 WAYNE L. REV. 1–17 (1955).

[505] Sir John Holt *in* Smith v. Brown and Cooper, 2 Salkeld 666. The common law never received a doctrine of true or absolute slavery, i.e., holding that some men are without cognizable rights. Any law that respects absolute slavery refuses to recognize personhood in the one said to be a slave because to do so admits to rights bestowed by the Creator. Personhood is inseparable from rights. Any person, whether in government or out, that refuses to recognize or otherwise violates a fundamental right of another, has done a personal offence against the Creator, who has bestowed that right. *See generally* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (recognizing that the *Creator* has placed within [*endowed*] each individual [*all men*: viz., mankind] rights from which the individual is inseparable).

By the fifteenth century, serfdom had died out in Britain. Serfdom, made up of villeins and cottiers, differed from outright slavery: instead of being the absolute property of an owner, as was the slave, the law identified the serf with a certain piece of land and bound him and his offspring to its soil. Thus, the serf's duty of obedience to the holder of the land the serf worked arose not out of the landholder's ownership of the serf, but out of his tenure of the land to which the serf attached. Therefore, as a matter of law, the landholder's control of the serf was indirect. Further, the landholder ended his right to the serf's labor only by transferring to another his rights in the land that attached that serf as farm laborer. In a word, the landholder's right to the obedience of the serf depended upon the landowner's right in the land. This small limitation on the landholder's rights over the serf left a legally cognizable right for the serf: the courts honored a serf's demand of his right that no one be allowed to separate him from the soil that he worked.

Moreover, villeins and cottiers being serfs and not slaves, the law barred anyone from removing them from the land or even for them to leave, of their own accord, the soil to which the law attached them. Indeed, the serf was a fixture of the land, inseparable from it as a matter of law: as was a permanent building and even more so than standing timber or minerals, which the titleholder could sever from the land by sale. Without his attachment to land, the serf was without legal identity. If the land owner was transferred title to another's use or tenure, those serfs attached to that piece of land went with the land as part of the bargain in the transfer, just as did a well dug on the property, a building set on deep foundations, or any other fixture deemed non-movable. The law described a serf's relationship to the land to which the law attached him much as it gave legal description of a permanent easement or improvement for recordation: the serf *ran with the land*.

Nevertheless, in mercy and contrary to strict legal logic—as right often is—the common law provided a way for the serf to detach himself from the land: if a serf escaped and remained gone from the land for more than a year and a day, he became, in sight of the common law, forever free from the land. For example, if a boy serf escaped, ran away to York, and apprenticed to a goldsmith—all-the-while eluding capture for at least a year and a day—, his serfdom ended; he might one day become wealthy.

Although slavery existed in England after the Norman Conquest, the Anglo-Saxon cottier was distinguished from a slave in that the cottier retained a few slivers of rights; as time progressed, the cottier's status slowly merged upward into villeinage.

Just as often as not, the thegn was glad to see such an one go because as the population of the manor grew,[506] the thegn had too-little land for everyone to till.

Besides the right to never be estranged from the parcel of land to which the law attached them, villeins and cottiers were entitled to one other right: the right to marry without consent of the thegn (manor lord). Moreover, their marriages attached more rights, binding and enforceable: the law recognized the legitimacy of their children and their children's rights of inheritance of property, even though meager.

Therefore, a serf, whether villein or cottier, was a person in some legal sense, having certain rights. Though his legal standing was only a small limitation on the control of others over him, still, the utter thralldom of slavery was not his—a weighty distinction in English law because, in time, any right the law recognized in a person came to spell the definition and status of a freeman at common law.

§ 3.2.3.3
The Copyholder

Copyhold tenure of land developed out of Anglo-Saxon villeinage and continued until 1 January 1926, when Parliament's Law of Property Act converted all holds of land into freeholds, thereby abolishing it.[507] The copyhold tenant held his land on the evidence of the land's deed recorded on the rolls the local manorial recorder,[508] much as county recorders record deeds nowadays in local county courthouses. The recorded copy of the deed provided the evidence that perfected the copyholder's rights, thus allowing court recognition and enforcement. "Hence, the tenant was

[506] The Anglo-Saxon population in England grew according to protein foods available. The introduction, for example, of lentils and peas in England as crops, increased protein in the diet of the farming villagers, lengthening life, and increased the population. In time, the manor lords had more workers than the land needed or could support; thus, the young often escaped without fear of being hunted down, setting off to settle in growing towns. As the America's began to yield her gold and silver, money became available, the manor farms sold their surplus in the growing towns for money to buy better waynage and draft animals to pull it. A like string of events has occurred—with variations—in the United States. Beginning before World War II, young men and their families, the land no longer able to support them due to mechanization of farming and greater yields bringing lower prices for farm commodities, have left the small towns, farms, and ranches for the cities, now burgeoning.

[507] Though Parliament has abolished copyhold tenure, "[a] few incidents remain," writes Moynihan: "e.g., the tenant's rights of common pasturage of beasts, continue to attach to lands formerly copyhold unless the lord and tenant agree to their extinction." CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 17 n.12 (1962).

[508] MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 371 (1936).

said to hold by copy of court roll and the form of holding was labelled [sic] copyhold tenure."[509] Copyhold tenure entailed a specified service to the thegn, or lord of the manor, for use of land, in lieu of rent payment.

Though the copyholder and the villein alike were without most legally cognizable rights of freemen; yet the two differed; unlike the villein, the copyholder held a single, peculiar—but nonetheless court detectable and therefore legally enforceable—right in land. The copyholder's rights were detectable and recognizable court evidence because the manorial recorder had recorded, on the rolls of the manor, the copyholder's agreement with the thegn, setting forth their reciprocal rights and responsibilities. Further, recording that paper perfected, fixed, defined, and made his right readily ascertainable to a court by reading his recorded deed. By contrast, though the villein held the right to demand that he remain with the parcel of land which attached him, no official written record of the villein's right existed; his right, therefore, was nearly non-detectable.

The lord of the manor recorded on the rolls of the manorial court the kind and scope of service his relationship to the copyhold tenant (copyholder) entitled to him. Therefore, albeit slight, the law limited the copyhold tenant's obligation and duty to the thegn to the kind and scope of his service as recorded: that and no other, that and no more. Thus, within the narrow slip of the court's recognition of this admissible written evidence limiting the landowner's right to the copyhold tenant's servitude, he was a freeman. The law, however, enforced the copyholder's right only in the manorial court over which the lord of the manor presided. Moreover, if the Jury empanelled in manorial court ruled against the copyholder, he had no appeal to the royal courts, being without subject-matter jurisdiction to review matters pertaining to villeins, copyholders, and cottiers.

As a rule, before about 1500, real-property law in the royal courts applied only to freehold tenantry, never to non-freeholders (copyholders). Then, beginning with the reign of Edward IV. (1461–1483), royal courts supported some rights of the non-freeholders, directing the lord of each manor court to instruct jurors to follow the manor court's previous findings on cases of like facts. The royal courts thus demanded that the manorial courts observe *stare decisis*, the common-law principle of precedent. This requirement not only brought consistency as under rules of law, it also established the power of

[509] CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 17 (1962).

appeal[510] for the aggrieved copyholder; enabling him to appeal to a higher court and insist that the Jury of the manorial court be given instruction to follow the previous findings of the court. Thus, the common law insisted upon equal protection of the law for non-freeholders as well as freeholders.

During the Anglo-Saxon period, England's economy was non-monetary; money was less than scarce; it was unknown. Farmland tenants paid for tenure by sharecropping,[511] paying in kind to the overriding landholder a percentage of the land's yearly harvest. The Black Death of 1348–1349 brought a scarcity of farm labor that "forced most manor lords to substitute money rent for labor service by the villein tenants."[512] By-and-by money, in gold and silver, weakened the relationships of the land-tenure system in England. "Gold and silver," said Samuel Johnson, "destroys feudal subordination." Even the bootblack, he observed, now accustomed to payment in silver coin, chooses his customers: i.e., those with whom he will enter into a contractual relationship. Money, over time, increasingly enabled landlords to choose their tenants or hire laborers; and allowed tenants to choose their landlords or to labor for money instead of entering a feudal-like tenant relationship.

By the seventeenth century, gold and silver mines in the Americas begin to yield their bounty, making money plentiful enough for men to amass capital and venture into manufacturing, colonization, shipping, and trade. With the swelling of these enterprises into worldwide and international competition, opportunity for England's farm tenants to

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[510] Then as now, a common-law court's denial of a motion or the Jury's guilty verdict conveys with it the potential of appeal, a power unavailable—in any comparable sense—under civil law. Though the right of appeal had always available to varying degrees in the common-law tradition, common law came to recognize the right as a matter of due process and part of the English Constitution:

> It is the glory and happiness of our excellent Constitution, that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment.

Pratt, L.C.J., 1 Str. Rep. 564 (1720).

[511] Sharecropping has persisted in the custom of American farms, but has within recent decades given way to fixed cash payments for rent known as *cash rent*. In the American Midwest during the last century, a customary sharecropper's tenant agreement granted two-fifths of the total harvest to the landlord and granted the remaining three-fifths to the tenant farmer, who paid the expenses, including seed and waynage.

[512] CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 16 (1962).

leave the land and seek fortunes elsewhere further weakened the power of freeholders to retain non-freehold tenants, such as copyholders.

§ 3.2.3.4
The Hundred Courts

The counties in the north of England call their hundreds "wapentakes, from the Anglo-Saxon "waepen" (weapon) and "tac" (take or touch), signifying those able-bodied men from the wapentake that will answer a call to arms: viz., the militia "called out" (Anglo-Saxon: fyrdfare or militia 'a going). The hundreds and tithings (each hundred embraced ten tithings) did not originate in England, but the Danes brought these from the continent, where they had used like divisions to enable readiness for the common defense.[513]

The *hundred* is an Anglo-Saxon land division smaller than a county or *shire*, but larger than a *tithing*. Each tithing embraced ten freeholder families; each hundred embraced ten tithings, or 100 families. On 25 Oct 1682, William Penn, following this old Anglo-Saxon pattern, divided Delaware into hundreds, each comprising 100 families. In so doing, Penn assumed that each family, including servants, averaged ten members. Following Penn's direction, New Castle County Delaware originally comprised five "hundreds," Kent County Delaware comprised five "hundreds," and Sussex County Delaware comprised two "hundreds." As population grew, several of these hundreds divided, creating new and additional hundreds.

The folk-law tradition of the *hundred*,[514] upon its plantation into England, provided the basis for the common law's fundamental territorial and political (*jural*) division: the county. Our present American county organization arose from the Anglo-Saxons' farming village system. The Anglo-Saxons grouped their family households into villages, their villages into *hundreds*, and their "hundreds" into *shyres* ("shires"), later called counties. Each hundred embraced a group of villages, which together had about one hundred households. Later, English law understood the hundred as a geographic division embracing

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[513] *See generally* 1 BLACKSTONE, *supra* note 12, at 110–112 (discussing the jural territorial divisions of England).

[514] Not only was the folk-law tradition of the Angels, the Saxons, and the Danes akin to that of Norwegians; it was also akin to that of the Picts, the Scots, the Welsh, the Cornish Britons, and Norwegians that had settled in Britain. *See generally*, BARRISTER-AT-LAW AND REV. FRANCIS NIGEL LEE, COMMON LAW: ROOTS AND FRUITS, THE ROOTS OF COMMON LAW IN BIBLICAL, IRO-SCOTIC, BRYTHONIC & ENGLISH JURISPRUDENCE—AND SOME OF THEIR FRUITS IN GREAT BRITAIN, AND THE UNITED STATES AND AUSTRALIA (1993) (1997) (tracing the common law from its earliest detections in history).

one hundred fighting men of the militia: the general male population between ages sixteen and forty five.[515] Over time, however, the hundred became a geographic division without regard to population, with a *hundred court* holding jurisdiction over each hundred. Though the Anglo-Saxon's hundred persisted through the Norman invasion, the Normans compromised its independent jurisdiction by replacing the locally chosen reeve (Anglo-Saxon for *agent*) of the hundred with an appointed deputy to the king's appointed reeve of the shire (shire-reeve or *sheriff*).

As do rural American township supervisors today, a board of elders (a small Witan) administered the business of each hundred. Unlike modern townships, each hundred maintained its own hundred court, drawing jurors at random for each case that arose. The Normans, however, removed pleas concerning land from the hundred courts to the shire (county) courts and limited the hundred courts' criminal jurisdiction to holding suspects in temporary custody until transfer to the shire court for trial. In the hundred, both the board of elders and the Jury were called the *moot*. English Colonists carried these divisions to North America: the hundred became the township; the shire became the county.

In 1971, England abolished her hundred courts. The American states Delaware, Maryland, Pennsylvania, and Virginia maintained the hundred as a jural subdivision. Today in America, however, hundreds exist only in

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[515] *See* THE FEDERALIST No. 4 (John Jay), No. 25 (Alexander Hamilton), No. 28 (Alexander Hamilton), No. 29 (Alexander Hamilton), No. 41 (James Madison), No. 45 (James Madison), No. 46 (James Madison), No. 56 (James Madison), and No. 69 (Alexander Hamilton) (providing the Founders' common-law perception of *militia*). In the United States, the militia comprises all able-bodied male citizens between 18 and 45 years of age who are not members of the regular armed forces. Anglo-American common law refers to this class of men in two ways: the *organized militia*, when called out, and the *unorganized militia*, while not called out. In either case, within the terms of the Constitution this class of men remains, nonetheless, the *militia*. Most state constitutions have like provisions and are valid except where they clash with national legislation. *See* Houston v. Moore, 5 Wheat. 1, 51 (1820) (concurring opinions delivered by Justices Washington, Johnson, and Story. *See generally,* EDWIN VIEIRA JR., CONSTITUTIONAL "HOMELAND SECURITY" (2007) (providing an analysis and call for Americans to revitalize "the militia of the several states," according to the authority of the United States Constitution). *See* U.S. CONST. art. I, § 8, cls. 15–16.

Further, as with the *fyrdfare* (by the letters, Anglo-Saxon for *militia 'a going*, i.e., militia activated) authority of the Anglo-Saxon kings, the President is the exclusive judge in the first instance concerning whether a given exigency requires the calling out of the militia. *See* Martin v. Mott, 12 Wheat 29 (1827) (Story, J., delivered the opinion of the court). *See* U.S. CONST. art. I, § 8, cls. 15–16 (stating that Congress is to *provide* for the calling out of the militia). The President, however, holds the sole authority, under standards set by Congress, for the decision to call out the militia. *See* STORY, *supra* note 89, at 420–26.

Delaware.[516] In New England, the newer English term *town*[517] replaced *hundred*; then, in Pennsylvania and New Jersey, *township* replaced the term *hundred*. Subsequent American jurisdictions followed the lead of New England and these Middle Colonies. The American township came to comprise a parcel of (give or take) six-miles square: i.e., thirty-six square miles of land or 23,040 acres.

§ 3.2.4
Anglo-Saxon Limited Government

The most remarkable of the Saxon laws we may reckon . . . [is] the election of their magistrates by the people, even that of their kings . . . [election of] all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coronors, their portreeves . . . continued till the Norman Conquest, others for two centuries after, and some remain to this day.[518]

The Anglo-Saxons' freedom to choose their magistrates and officers and to reject hereditary succession persists in common-law countries. Our American common-law tradition harks back to the Anglo-Saxons. As did they, we also elect our local sheriffs, coroners, tax assessors, and judges; and cast our vote for state governor and national president.

The Anglo-Saxon tribes transacted their government business *omnium consensus* (by a consensus of all). As a practical matter, this meant "by consultation of all," either directly or indirectly. The Anglo-

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[516] By 1875, the total number of hundreds in Delaware had grown to the present-day 33; their boundaries have remained essentially unchanged. Due to the Supreme Court's finding in Roman v. Sincock, 377 U.S. 695 (1964), Delaware's hundreds no longer serve as judicial or legislative districts. *Roman* disallowed state legislative election districts based solely on geography, requiring instead that each district be of equal population. Following the Court's finding in *Roman,* Delaware redrew its legislative district boundaries based on population distribution, in disregard of her hundred boundaries.

Roman v. Sincock was one of six cases called the "Reapportionment Cases." In these cases, the Supreme Court found that districting methods for state and federal legislative elections that are based solely on territorial area, in disregard of equivalent population, violate the *one man, one vote* doctrine. The Court, therefore, directed the states to redraw their legislative districts after each decennial census so that the geographic area of each district comprises equal population. Further, if the legislature is bicameral, the equal population requirement is to apply to both houses. All states have bicameral legislatures except Nebraska. The Reapportionment Cases "effectively declared the apportionment of every state legislature unconstitutional." J.A. Peltason, *Reapportionment Cases*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1992 710 (Oxford Univ. Press 1992).

[517] In England, the terms *village* and *town* differ: "village" signifies a group of houses having no market place or business district; whereas "town" denotes a village having a market place or business district. This general difference has carried into North America.

[518] 4 WILLIAM BLACKSTONE, COMMENTARIES *418.

Saxon's method resembles modern corporation law requiring shareholder control in major decision, that is, where each shareholder holds a stake in the outcome. Depending upon whether the matter under consideration was *de minoribus consultant principes* (concerning minor things) or *de majoribus omnes* (concerning major things), they achieved consensus of all in one of two ways: "Concerning minor things, they consult the leading men; concerning major things, everyone."[519]

The Anglo-Saxon earls chose each of their kings, allowing them to rule only with their consent and by their advice. Though Britain nowadays appears to have drawn back somewhat from these standards, the Constitution's Framers harked back to Anglo-Saxons' pre-Norman standard, requiring that an electoral college choose the President, allowing him to exercise authority only with the advice of the Senate and sometimes requiring its consent.

American limited government under the Constitution is rooted in the Anglo-Saxon's *Volkriht*. The assembly of earls called the *Witan*[520] granted executive authority and power to Anglo-Saxon kings, each exercising this authority at the Witan's advice and consent.[521] For example, because enemy attack demands an armed answer, quick and sharp, the Witan empowered the king to muster the *fyrd* (militia of able-bodied men) for war without the Witan's consent, but required its consent before commencing hostilities[522]—unless the opportunity to

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[519] Tacitus, *De origine et moribus Germanorum*, ch. 11, *in* TACTIUS, AGRICOLA, GERMANIA, DIALOGUS (Loeb ed., 1970), *cited in* SIDNEY, *supra* note 451, at 103.

[520] The name *Witan* is the abbreviated form of the Anglo-Saxon *Witanagemot*: by the letters meaning, "the whiteheaded council–of aged men–in meeting." *Witan* stems from the Anglo-Saxon *whiten*: in this instance signifying the hoary head of the older, and therefore (at least in theory), wiser man.

More exacting, three Anglo-Saxon roots conjoin to form *Witan-age-mot*. *Witan* (from the root *wi-*) is an old root for the color white, hence the following related terms: "*wi*-nter" (snow and frost); the Celtic "G'*wi*-never" and its Anglo-Saxon cognate "Jennifer" (a fair maiden); and "*wi*-se" (the wisdom of an older white head). Eventually the infinitive form, *wit*, and the indicative, *wist*, and wise came to signify "one in the know." *Wits* and *witness* also stem from this root: a "witness" being one with personal and sensual direct *knowledge* of a fact. *Age* implied—as it still does—maturity or older ones. *Mot* signified a meeting; the related term *moot* signified the common place of meeting. The *Witan-age-mot* then was *the council of the old white heads in meeting*.

A white or graying head, however, is no guaranty of wisdom residing within.

See Proverbs 16:31. Cf. *James* 1:5, for the remedy.

[521] *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (using the ancient Anglo-Saxon phrase *advice and consent* to circumscribe the President's power within the Senate's limits): The President "shall have the Power, by and with the Advice and Consent of the Senate . . . ." *Id.* (capital letters in original). The prepositions here are significant: the President's power is consented to *by* the Senate, followed by exercising the power *with* the Senate's advice.

[522] The Anglo-Saxon kings, with the advice and by the consent of the Witan, called out the militia or *fyrd*. Seldom was it necessary to call out the fyrd. However, once called out,

make effective defense afforded no time to obtain consent. Offensive action (attack) could also be an effective defense.

Likewise, constitutional custom empowers the President to mobilize the armed forces for war; but before commencing hostilities, he must ask and receive from Congress a declaration of war.[523] Only upon the advice and consent of the Witan did Anglo-Saxon kings levy the Dane gold property tax for raising an army. Likewise, American presidents set before Congress their proposals for taxation to support military activities; then Congress, holding the power of the purse, denies, consents, or modifies at its pleasure.

History has preserved minutes of council meetings of kings and earls during the times of Alfred the Great, evincing common-law principles of limited government practiced in Anglo-Saxon England.[524] The Anglo-

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the *fyrd* (inactive militia) became the *fyrdfare* or "militia 'a going." The Celtic chieftains, as the Anglo-Saxon kings, also ruled only at the advice and consent of their council:

> British councils were attended by all able-bodied men. The power of the chiefs, except in actual war, was very small . . . [E]very man [was considered] to be equal, and each had a voice in the management of affairs. Thus every chief had, before taking up arms, held a council of his tribesmen, and it was only after they had given their vote for war that he possessed any distinct power and control.

G.H. HENTY, BERIC THE BRITON: A STORY OF THE ROMAN INVASION 107–08 (Mill Hall Penn., Preston Speed 1996) (1892). Executive power was, therefore, limited as to subject matter, scope, and duration. Thus, also, the Constitution limits the executive power respecting war.

At times, presidents have ignored these constitutional restrictions. The War Powers Act of 1973 is a modern expression of this ancient common-law principle:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

H.J. Res. 542, 93rd Cong. § 2(c) (1973) (enacted). Americans have ignored the foregoing ancient and necessary common-law distinctions our Constitution and Congress have recognized. The Constitution places in Congress alone the power to declare war, to raise armed forces, and to outfit them. The Constitution thus limits the President's command of the armed forces. The Constitution also limits the President's responsibility of ending hostilities by striking the peace: he can only proceed by and with the advice and consent of the Senate.

[523] *See* U.S. CONST. art. I, § 2, cl. 1. The President is duty bound to insure that the military forces are ever ready, according to whatever means Congress provides.

[524] See generally § 4.1.3.2 of this book (discussing the emptiness of Greek and Roman ethics compared with the Word of God and discussing the common law's accord with Scripture).

Saxon's *Witan*—the harbinger of the British Parliament and the United States Congress[525]—was their meeting of elders. When an Anglo-Saxon king died, the Witan often, but not always, appointed one of the deceased king's kindred[526] to succeed him.

The Anglo-Saxons lived close to tribal life; often the viable candidates for king were of the former king's and Witan members' kith and kin. Nevertheless, at their king's death, their law never required that the Witan chose a family member of the former king to succeed him, and at times, the Witan appointed a non-family member.[527] Thus, regardless of the king's pedigree, the Anglo-Saxons limited their monarchy: the Witan appointed the king, who served the Witan's pleasure, enforcing laws and levying taxes only with the advice and by the consent of the Witan. Moreover, the Witan's power of appointment carried with it a power of disappointment: the law authorized the Witan to impeach and dismiss the king and appoint another.

These first principles of common-law government found their way into the United States Constitution, authorizing the President (for example) to wage war, negotiate and enter treaties, and make certain appointments to office only with the advice and consent of the Senate. In addition, the House of Representatives has the power of impeachment (akin to the Grand Jury indictment) over the President and those he has appointed to office, for high crimes and misdemeanors; once impeached, the Senate has the power of conviction by trial and removal from office, thereby checking the power of the executive and his appointees.[528]

A ninth-century land deed provides an example of the Anglo-Saxon kings' limited authority: their law required the king obtain consent of the Witan before transferring his possession of land or even his movables

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[525] Parliament is an unconscious continuation of the Anglo-Saxon's Witan. After the Norman Conquest, the Normans discontinued the Witan. Later, in 1265, at the summons of Simon de Montfort during his struggle with Henry III. and his son Edward I, Parliament arose in like form and function to the Witan.

[526] The English word "king" stems from the Anglo-Saxon *cyning* and the Old Scandinavian *konungr*: in both words, the suffix *-ng* means "head of kin." Kings were originally senior members of a tribe or clan comprising his next of kin (immediate family or nearest relatives living), his kin (extended family), and his kith (friends and neighbors).

[527] Though Scripture does not require the chief executive of a nation to be the immediate descendant or heir of his predecessor, it does require that God choose him from among that nation; he may not be a stranger. *See Deuteronomy* 17:15. *See also* U.S. CONST. art. II, § 1.

[528] *See* U.S. CONST. art. I, § 2, cl. 5 (lodging the sole power of impeachment in the House of Representatives); art. I, § 3, cl. 6 (lodging sole power to try all impeachments in the Senate); art. I, § 3, cl. 7 (limiting penalties the Senate may impose for conviction in cases of impeachment); art. II, § 4 (setting forth officials subject to and reasons authorizing their impeachment).

(chattels) to another. Dated "in the year of our Lord's incarnation 855," the deed provides the words of purchase designating transfer from the English (Wessex) Crown to a thegn named Dunn:

> [T]o Dunn, my thegn, one dwelling which we call in Saxon *haga*, to the south of Rochester, and 10 acres adjacent on the south side of that dwelling, and also 2 acres of meadow and 10 wagons loaded with wood on the king's hill, and the rights of common in the marsh which rightly belonged to that dwelling of old.[529]

The transfer required that King Æethelwulf[530] first seek and obtain the consent of the Witan, consisting of eleven thegns, four *ealdorman*,[531] a neighboring fellow-king Ethelbert, the archbishop Ceolnoth, and King Æethelwulf's son Alfred, each subscribing his name, followed by his title and the Latin words, *consensi et subscripsi* (have consented and subscribed).

At the time of this land grant, king-to-be Alfred the Great was King Æthelwulf's six-year-old son; even Alfred's consent by his signature was required and is included. Alfred, being a boy, was not a member of the Witan, but his signature is included as a precaution under the Saxons' laws of *gavelkind*.[532] Alfred signed under the words, *Ego Aelfred filius*

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[529] English translation *from* D. WHITELOCK, ENGLISH HISTORICAL DOCUMENTS C. 500–1042 (1955), *provided by* William F. Fratcher.

[530] At the time of this transfer and according to the deed, Æethelwulf was "king of the West Saxons [Wessex] and also of the people of Kent." By A.D. 820, the kingdom of Wessex had arisen to preëminence among the other Anglo-Saxon kingdoms, lifting the king of Wessex to be king of England; his fellow Saxon kings came to be called earls. Among English kings, therefore, Æethelwulf was preeminent. Nonetheless, the earls remained kings, powerful in their own realms, but subordinate in matters requiring national unity, such as military action against invasion.

[531] *Ealdorman* is an elder man or "earl," or in Old Danish, "yarl."

[532] Arising out of Kent, gavelkind tenure in land became widespread in England before the Norman Conquest of 1066. The Anglo-Saxons' gavelkind tenure allowed advantages not available under the Normans' inheritance laws of primogeniture. Gavelkind enabled deeding of inheritable land outside of one's family by will and kept one's land from falling (escheating) to the Crown for a felony conviction, other than for treason or for want of heirs, and made land alienable by an heir at age fifteen, or possibly younger.

Moreover, the Anglo-Saxons' gavelkind allowed distribution to all sons *equally*; the Normans' primogeniture, on the other hand, entailed the oldest son to inherit the father's property. Inheritance laws throughout the United States reject the Normans' primogeniture and follow the pattern of the Anglo-Saxons' gavelkind, requiring that, in cases of intestacy, all of the deceased person's children share equally, and that property escheat to the state only if there are no heirs. Gavelkind persisted in parts of Britain until Parliament officially abolished it in 1925. *See* 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I. 273 (2d. ed. 1899), *in* BLACK'S

regis consensiet subscripsi (I, Alfred, the king's son, have consented and subscribed). The thegns signed under the Latin *dux* (meaning "leader"); the ealdorman signed under the Latin *miles* (meaning "soldier"). Scribes drafted such instruments in Latin or, at times Anglo-Saxon—after King Alfred reduced it to writing about 875 A.D.—, depending upon the drafter: Latin if drafted by a churchmen or Anglo-Saxon if drafted by the king's men.

The ancient Anglo-Saxon forms have proven difficult to improve upon.[533] Common-law deeds used today are mostly the same as this one, in both form and content. Though this land grant transferred only a dwelling, ten adjacent acres, two acres of meadow, ten wagonloads of wood, and rights in common to an adjoining marsh, the King of England was powerless to make the transaction without unanimous consent of the Witan, providing an early example of the common-law principle of limited executive power.

§ 3.2.5
Anglo-Saxon Common Law: Custom Unwritten

To preserve the common law's (folk law's) principles, Anglo-Saxon kings throughout England sometimes issued written statements of these principles. Though good, such written ideals of law were of little effect for two reasons. *First*, local variations in application of common-law principles remained stronger than the king's remote power. *Second*, these written statements contained foundational first principles held in common throughout England; they never supplanted, therefore, local custom from county to county and from town to town.

The principles of the common law were customs the members of villages all knew and practiced, as well as those of the hundreds (townships) and shires (counties). Therefore, when parties litigated, jurors drawn from these localities to sit as judges, never needed written jury instructions on the law. In addition, though King Alfred had recently reduced the Anglo-Saxon tongue to writing, it remained yet unknown: from the highborn to the lowborn, Anglo-Saxons were illiterate, able to neither read nor write. Thus, in the course of trials in the common-law

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LAW DICTIONARY 225 (7th ed. 1999). *See generally* 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW 261–66 (2d. ed. 1903).

533 See D. WHITELOCK, ENGLISH HISTORICAL DOCUMENTS C. 500–1042 (1955), for an English translation. See H. PIERQUIN, RECUIEL GENERAL DES CHARTES ANGLO-SAXONS (1912), for a Latin translation.

courts, written statements of law were not only unnecessary but also unusable.[534] Consequently, early documents of the Anglo-Saxon kings' recording common-law principles, though mentioned and cited in other documents, have not survived for our examination.[535]

A chief advantage of the common law is that it remains an oral tradition. Unlike the written, and largely hidden, proceedings of the civil-law inquisition, common-law trials are public contests of words and wits and oaths, open and visible to the juror's consideration and the people's scrutiny. That the common law is an oral tradition is due to the necessity of oral proceedings among the illiterate early Anglo-Saxons and Danes—some later calling themselves *Anglo-Danes*—as distinct from the somewhat Romanized Normans.

King Alfred first compiled the common-law principles in writing, along with the leading principles of Holy Writ, calling his work *Alfred's Dome Book*—sometimes written *Dombook*. Consequently, some historians mistakenly style Alfred the composer of the common law. Kings following Alfred sometimes reissued the principles of his *Dome Book*; in time, the Danelaw quickened and reinforced these principles. Alfred's *Dome Book* was extant until the time of Edward IV., but is now lost. The *Laws of Edward the Elder*, Alfred's son, include an injunction to follow his father's *Dome Book*. Over 350 years later, Edward the Confessor compiled a digest of the common-law's leading principles gathered from throughout England "with such additions and improvements as the experience of a century and an half had suggested," calling it the *Laws of Edward the Confessor*. Historians, therefore, rightly call Edward the restorer of the common law.

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[534] When King Alfred reduced the Anglo-Saxon tongue to writing, the common law used written Anglo-Saxon to preserve the rules of law that had arisen among them and had always before been passed along by word of mouth. Nevertheless, trial before the Jury being the foundation of the common law, the oral tradition remains an indispensable common-law property; the written word is also necessary, preserving the oral statements. Engaging the ears further engages the mind. *See, e.g., Deuteronomy* 5:1, 6:3–4, *Revelation* 1:3.

Old Testament exhortations to read the Scriptures aloud were never because most ancient Hebrews were unable to read—the Hebrews are likely the only people group that have been literate as far back as history traces them, i.e., from 70 A.D. (when Titus destroyed all Hebrew records of genealogy) and before—, but because God has ordained that, where possible, truth best captures the mind where audible: *e.g.*, read aloud in "the audience of the people" (literally, "in the ears of the people": באזני העם) (*see Exodus* 24:7) and "in their ears" (באזניהם) (*see* 2 *Kings* 23:2). "You heard the sound of the words," Moses reminded his people, "but saw no similitude—only a voice." *Deuteronomy* 4:12. *See further Deuteronomy* 4:15–16 (providing the reason for audible speaking of truth). *See also Galatians* 3:2, 5, *Deuteronomy* 31:11. "*The* faith [saving faith]," says Paul, "is from hearing, and the [that] hearing through a word from God." *Romans* 10:17.

[535] *See* 1 BLACKSTONE, *supra* note 12, at 66.

Because the Anglo-Saxons never used legal codes, neither did they demand a full-time class of legal experts called lawyers. The reverse also was (and remains) true: without a professional class of lawyers, neither was there need for legal literature, including codes. Moreover, where the Jury interprets and applies customs held in common, legal experts are unnecessary. For these reasons, our knowledge of law and government from the England's Anglo-Saxon period is limited to facts and inferences drawn from transactional documents, such as deeds and charters.[536] The scanty legal literature that has survived is that which followed the Anglo-Dane reception of Christianity—from the ninth century to the Norman invasion of 1066.

Because the Anglo-Saxons saw the human writing of laws as human creation of laws, they were loath to put their law in writing—a reasonable conclusion.[537] In the Anglo-Saxons' view, to create their own law was as impossible as creating their Creator; further, any attempt to do so was dangerous, being an usurpation of the divine prerogative. Thus, the early common or folk law differed from the civil law in the conviction of the Anglo-Saxons: because right and wrong have always existed in the eternal mind of the Creator,[538] the folk-law principles and their applications have always existed. Never was the time, they believed, when the Creator of all things was non-existent; thus, never was the time when the right application of law in a particular circumstance (the law of the case) was unknown to the mind of the Creator. To the Anglo-Saxon, the law—right distinguished from wrong; good distinguished from evil—was unchangeable. Thus, the courts being unable to create law, they must

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[536] During pre-Norman times, the term *charter* became a catchall phrase for any writing having formal legal significance. Centuries later, the United States Supreme Court heard the famous Dartmouth College case concerning the "charter" granted by the English Crown in 1769 to establish Dartmouth College. At issue was whether Dartmouth's charter was a contract at common law, and if so, did it fall under the protection of the United States Constitution's Contract Clause. *See generally* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819). Daniel Webster represented Dartmouth College and argued that the charter was a contract within the contemplation of the Contract Clause. The Court's finding not only accepted that a contract is a promise or undertaking, but also insured the promises of contract from state legislative meddling and fortified private education against state intrusion.

[537] Because God, as Lawgiver, wrote His standards with His own fingers on the tables of stone at Sinai (*see Exodus* 31:18), His particular judgment against Belshazzär on the wall of the palace at Babylon (*see Daniel* 5:5), and His condemnation against the Pharisees in the dust on the ground at Jerusalem (*see John* 8:6, 8); it was reasonable—though not entirely correct—for the Anglo-Saxons to conclude that to write law is to create law and thus to usurp the divine prerogative. Moreover, though false, the Roman Church taught that the scholars' writing of the civil and canon-law codes—and even the writing of the Scriptures—were man's creation of law.

[538] In this spirit, Blackstone describes the findings of common-law judges as *oracular*.

discover, discern, and then apply law to the peculiar case pending before it. Consequently, in their minds, someone knowing the law and its application before the court knew the facts of the case was ridiculous. In a word, the Creator has always existed, has never been ignorant of anything; therefore, the Creator's standards of right and wrong are timeless also.

The Anglo-Saxons, thus never considered that they were to make new laws as needed, but instead, they were to discern, and approve or disapprove, expressions of the law as applied in particular cases. This single belief puts the gravamen of difference between common law and civil law. Roscoe Pound considers the two fundamental qualities of the common law—precedents[539] and the doctrine of law's supremacy—to have sprung forth, by nature, from "the Germanic idea of law as a quest for the justice and truth of the Creator."[540] The Creator, by His common grace, had stamped this idea into their thinking. The rules of common law and civil law are often the same on particular points, but their views about the source and essence of law are distinct and contrary.

In summary, the essential difference between the Anglo-Saxons and the Roman civil lawyers is not that they did not see eye-to-eye on this or that particular legal requirement, but instead, that they looked in different directions to discover the source from which law springs. The civil lawyer looked subjectively to the abstract and illusive reasoning of man as expressed in, and extrapolated from, his civil-law Code; the Anglo-Saxon looked objectively to the unchanging truth consonant with the Creator's revelation. The common law demands a new way of thinking, that is, a change of mind that rejects the mind of man as the final judge of law respecting any given set of facts.[541]

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[539] At common law, a precedent is a court finding which by its expression gives a principle that a later court will thread into its finding, citing as guidance for a new case on like facts and circumstances. "One may often accord respect to a precedent not by embracing it with a frozen logic but by drawing from its thought the elements of a new pattern of decision." LON FULLER, ANATOMY OF THE LAW 151 (1968). Precedent is strongest when the applicable principle forms a pattern running through many trials and findings.

[540] ROSCOE POUND, SPIRIT OF THE COMMON LAW 182–83 (1921).

[541] See generally app. 13 of this book (discussing Martin Luther's translation of *repentance* as an effectual change of mind).

§ 3.3
Scripture Holds Steady the Common Law

[T]he precepts of the law rest on eternal foundations.[542]

Upon arriving in Britain, "the [Anglo-]Saxons exterminated, rather than subdued the ancient inhabitants [of Britain]."[543] They retained in their folk law ideals of limited government, "[b]ut . . . far from practicing these ideals, [they] introduced a whole scheme of society which was fundamentally sordid and vicious."[544]

The pagan Anglo-Saxons and Danes, although a dangerous lot, had nevertheless discovered, by nature, the elements of common law and government. Following their migration to the Island of Britain, the written Word of God nurtured the common law's precepts and replaced Anglo-Saxons' false god of fate with the God of Scripture.[545] The mind of fallen man is dark, rendering him powerless of himself to hold steady in practicing right principles of law and government; he is, nonetheless, able to discern these. God, having stamped the desire and ability to know the law upon the natural consciousness of the Anglo-Saxon and Dane, his ability to discern God's standards of law and government was, as with all of Adam's race, *native*.[546]

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[542] STORY, *supra* note 89, at 593.

[543] 1 DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, 138 (1778).

[544] CHURCHILL, *supra* note 62, at 48.

[545] "[W]hile the Roman law was a deathbed convert to Christianity," says Wu, "the common law was a cradle Christian." On the contrary, the Roman law never converted to Christianity; rather, the Roman Church impressed the Rome's civil law into the service of the Roman bishops, from whence it has disseminated. See generally §§ 2.7.6, 2.8.2–2.8.3 of this book (discussing the history of civil law as expressed in Justinian's Code).

Wu's statement quoted above is true in that common law was a cradle Christian, but errs in that Roman civil law is a convert to Christianity. Fortunately, Wu was more profound than were his presuppositions; his insights often rise above them. Notwithstanding his false presuppositions, Wu demonstrates a working familiarity with Scripture and insight into the essence of the common law. His observations are keen and measured. Methodist missionaries introduced Wu to Christianity; he expresses a studied appreciation for the indispensable contribution of Puritan theology to the success of the United States.

As is discussed in § 2.8.2 of this book, pope Gregory VII resurrected the Roman civil law in an effort to justify his long-armed imperial decrees and his imperial church. Rome's decrees, however, bear not the authority of the Scriptures. Nonetheless, referring to the papacy's decrees, Wu states that the Roman Church has ratified and sanctified the civil law as an object of veneration and even faith. *See* WU, *supra* note 39, at 43, 45, 65, 229.

[546] When men demand right behavior in others, says C.S. Lewis, even though neglecting to behave right themselves, they prove that the potential to know the law dwells in their

Having discovered these standards, only through contact with the Scriptures did the Anglo-Saxons and Danes establish such forms and practice such first principles.[547] Though the precise date for the arrival of Christianity in Britain is unknown, its coming to the Island was, by necessity, with the Scriptures; evidence puts it—at the least—two centuries before A.D. 408, when the first great wave of Anglo-Saxon raiders breached the shores of the Island to settle. "Parts of Britain," wrote Tertullian about A.D. 200, "were inaccessible to the Romans but have yielded to Christ."[548] The earliest evidence of Christianity in Britain is from the first century, during Rome's early occupation; that its truth, even at that early date, had permeated, is reasonable.[549]

D'Aubigné—having gathered and ruminated over more evidence relevant to the coming of Christianity to Britain than has anyone before or since—puts Christianity in the inaccessible reaches of the Island, and even the isles neighboring Britain to the west, well before A.D. 200. "In those mountains, forests, and western isles, which for centuries past the Druids had filled their mysteries and their sacrifices, and on which the Roman eagles had never swooped, even there the Name of Christ was known and honored."[550]

In all events, by the time the Anglo-Saxons were settling Britain, the Scriptures, having already arrived, were enlivening the inhabitants, thus bringing to bear upon government a greater and irrepressible external force, bridling theretofore unbridled personal and state aggression; bounding any unjust reach of state power.[551] In short, long before Roman

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unregenerate character by nature. *See* C.S. LEWIS, MERE CHRISTIANITY 3–7 (1952). See generally § 5.1.2 of this book (discussing natural law as set forth in the Scriptures).

[547] The Word of God is alive (quick) and powerful. *See generally Hebrews* 4:12 (describing the Word of God with *τομωτερος υπερ πασαν μαχαιπαν*: by the letters, "*more* cutting *above* every double-edged sword.") See also generally § 4.1 of this book (discussing the necessity of the power of God's Spirit to sustain right government forms and procedures).

[548] *Quoted in* 1 D'AUBIGNÉ, *supra* note 19, at 25.

[549] British legend bases the originating authority of British Christianity on the *writings* of John the apostle—viz., *John's Gospel*, his three epistles, and his *Revelation*—which Joseph of Arimathea, a respected member of Israel's high court the Sanhedrin, carried to Glastonbury. *See Mark* 15:43–46. Roman legend, on the other hand, bases its authority on the claim of an unbroken succession of *priests*, traceable to Peter the apostle. Thus, the British legend rests for authority direct upon Scripture; the Roman legend seeks to trace authority indirect through men through centuries to a disciple, the man Peter. Although both are legends, their differences reveal underlying inclinations respecting sources of authority, which history affirms.

[550] 1 D'AUBIGNÉ, *supra* note 19, at 25 (capital letters in original).

[551] Without the Word of God, says Acton, there will be "no limited government, no state the circumference of whose authority had been defined by a force external to its own." ACTON, ESSAY ON FREEDOM AND POWER 56–57 (1949). Without the authority from heaven coming to earth, the state is total. We are to pray, therefore, that God's kingdom come; His

religion seduced Britain, and much after that time, the Scriptures were alive, active, and available there. Early Celtic and Anglo-Saxon Christian commentators, paraphrasers, and translators of the Bible include Patrick of Armagh (A.D. 360–461), Columba of Iona (A.D. 521–597), Caedmon the cowherd and hymn writer of Whitby in Umbria (A.D. 650–735), Bede of Jarrow on the Tyne, County Durham (A.D. 673–735), and King Alfred the Great (A.D. 849–899).

The Irishman Columba was the mirror image of Patrick the Briton; both men lie in grave under the same stone at Iona off the Scottish coast. Patrick brought the gospel from Britain to Ireland; years later, Columba brought the gospel back to Britain from Ireland. Patrick's father Calpurnius was a deacon in the British Church and a Roman *ducurio*; his grandfather was a local presbyter. Patrick's writings are all in a vulgar Latin and "indicate," says Blair, "no connection whatsoever with Rome." Caedmon, was a spontaneous and gifted singer and songwriter. Without any formal education and his time taken up with herding and tending cattle and horses, Caedmon recounted in poetic verse his understanding of the Scriptures as he heard others read them. Bede's best-known translation is of John's gospel, of which he dictated the last few verses, while lying on his deathbed, just before expiring.

Thus, at the arrival of the Anglo-Saxon tribes in Britain, the Scriptures and its ideals had adopted and cradled their *Volkriht*, which England later called the common law.[552] Britain, being insular, allowed the Scripture's and the common law's early incubation among the inhabitants and later free development in open rivalry with the canon and civil laws, according to the measure of fair play, namely, due process. In Britain, the playing field was more level than on the continent. The native genius of the common law is its adversarial character; demanding conflict, it draws life and strength from adversity. In a word, battle by trial according to fair play over real questions of life and property, is the life of the common law. In Britain, the civil law's attempts at subversion of Scripture and assaults upon the common law, therefore, enlivened its soul and enhanced its effect; focusing attention on its fundamentals, it tempered them, refined its identity, and spread its authority.

The Anglo-Saxon, long before migrating to Britain, had concluded aright that neither he nor any other mere mortal or combination thereof

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will be done on earth. *See Matthew* 6:10. See also generally app. 15 of this book and accompanying notes, for a discussion of *βασελια* (*baselia*), the New Testament term for authority: the delegation to act over a certain matter, person, or place.

[552] At the time Christianity adopted the common law, the Anglo-Saxons called its principles, taken together, their *Volkriht* (folk law).

could be, by any stretch of sense, the fountain of law; on this truth he had set his deepest religious conviction and his practice of law and government.[553] The Christian Scriptures offered the same conclusion, but with the added benefit, unavailable anywhere else, of relief from the power of sin and guilt—an offer irresistible to the one called of God.

Modern common-law forms and principles are traceable to the early Germanic folk law. Beyond that, human reception of the common-law tradition grows dim in the fog of antiquity. Of these tribes, the common law has descended direct from the traditions of law and government of the Anglo-Saxon and Danish tribes[554] that migrated to England during the fourth through the ninth centuries. Though the law and government of the Celtic tribes in Britain before the Anglo-Saxon and Danish migration had been practically indistinguishable, the Roman occupation had compromised the controlling features of the Celt's law and government.

Beside the Germanic tribes, other ancient peoples and nations had developed traditions of law and government similar to the *Volkriht*. None, of these, however, survived, as did the early law and government tradition of the ancient Teutonic tribes of the northwest of Europe, which were akin even in their particulars, all bearing a striking likeness. Upon the Anglo-Saxons' arrival in Britain, their ideals of law and government merged with the Celts', overcoming the Roman influence for at least the next two centuries. During this period, the British Church flourished, resting for its authority on Scripture and forming its government independent of Rome's law and her imperial church. Then, the arrival of the Danes quickened and strengthened the common law's recognition of the sanctity of personal relationships and of individual property ownership.

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[553] See generally § 3.2.1 (discussing the pagan Anglo-Saxon understanding of fate and judgment).

[554] See generally § 3.4 of this book (discussing the Danish resurgence of the folk law among the Anglo-Saxons). From the Latin, *tribe* signifies a "sprouting up" or "growth." *Tribe*, therefore, is a good translation of the old Norse root, *stamms* (English, "stems"): "from a common root." A tribe consists of those descended from a well-known common ancestor, as, for example, the tribe of (descendants stemming from) Judah. *See, e.g., Isaiah* 11:10, *Romans* 15:12.

§ 3.4
The Anglo-Danes

The Danish invasions of the ninth century subjected the eastern parts of the island to new Scandinavian influences. Where the Danes conquered, their 'Danelaw' prevailed. The very word 'law' is believed to have been given to the English language by the Danes.[555]

Three tribes from the region of Jutland came to occupy what would become England: "the Angels, who lived in the region of modern Holstein [lowest region of Danish peninsula], the Jutes, who lived in the region of modern Jutland [upper Danish peninsula], and the Saxons, who lived in the region of modern Schleswig [lower Danish Peninsula]."[556] The Angels and Saxons arrived in Britain before the Jutes (Danes) and settled in scattered villages. Despite the isolation of their villages, the Anglo-Saxons formed small, loose alliances that over time welded into small kingdoms to better defend themselves from Scandinavian aggression, mostly Danish.

The Angels' Kingdom of Mercia, in the central region of present-day England, at times ruled the entire Island; the Kingdom of Wessex, in the south of England, also became preeminent. By A.D. 820, Wessex had risen to dominate the other kingdoms; the King of Wessex became king of England and the other kings became subordinate kings known as earls. These earls, nonetheless, remained kings, each powerful in his realm.[557] Ever present, the Celts still dominated the North (Scots and Picts) and

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[555] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 3 (1990).

[556] GEORGE PHILIP KRAPP, MODERN ENGLISH: ITS GROWTH AND PRESENT USE 20 (1909). Not all agree with Krapp precisely, but most agree with him generally. Historian Bede, writing around A.D. 731, places the original home of the Jutes in the north of the Jutland peninsula, of the Saxons in the south of the peninsula, and of the Angels on the peninsula between the Jutes and the Saxons.

[557] The Anglo-Saxon king chose the earls, or *ealdorman*, from among the noble class to oversee each shire—the English *shire* came to be called the "county." The earl usually called together the shire court and commanded the shire militia; his title, by default, became hereditary. When the Danish influence began to take hold, the Anglo-Saxon word *earl* changed, by the fluidity of the vowel sound, into the Danes' pronunciation *iarl* (pronounced "yarl"). *See generally* MARIO PEI, THE STORY OF LANGUAGE 154 (1949) (providing a partial list of the Danes' contributions to English vocabulary).

After a time, the first-appointed earls were deceased; new kings were strangers to the successor earls. Being unwilling to trust the successors earls, but also unwilling to end their earldoms because politically risky, the kings sent a *reeve* (Anglo-Saxon for "agent") into each shire to look out for the Crown's interest by riding herd on the earl.

The shire folk called these kings' agents "shire-reeves" because they were *reeves* (agents) of the Crown in the *shires*. The rural folk slurred *shire-reeve* into "sheriff"; we have been slurring the compounded word ever since. *See* M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 38–41 (1942).

West parts of Wales; during this period, the Anglo-Saxons never governed these Celtic kingdoms.

As the Danish Vikings' (Jutes') urge to migrate grew stronger, their invasions came oftener and fiercer; thus, England's small kingdoms allied against them. At first, the Danes intended only to raid, then invaded with intent to remain, remained with intent to conquer, and finally, after much struggle, received Christianity from the Anglo-Saxons, merging their blood and customs with them, becoming the Anglo-Danes. The Anglo-Saxons, for their part, allowed the customs of the Danes to check, arrest, and reverse their drift toward the Roman system of agriculture and the use of slaves.

The Danish influx into the Island was whelming: one Danish Viking fleet comprised over 300 ships. Danish aggression escalated until the Danes had driven the Anglo-Saxons into two areas of the Island: a small strip of land in Cornwall and the west of Wales. Whereupon, Alfred the Great rallied the Anglo-Saxons and drove the Danish King Hæsten back to the east coast of England. There, while holding the Danes at bay, Alfred became the indirect cause of the Hæsten's reception of Christ. King Alfred had taken Hæsten's two sons prisoners of war along with Hæsten's wife. While imprisoned, Hæsten's sons confessed faith in Jesus Christ. King Alfred of Wessex and his brother, King Ethelred of Mercia, now Christian brothers with Hæsten's sons, in a brotherly gesture, returned the sons' mother to their father Hæsten. From these events, Hæsten made Christian confession; thus arose the first Christian King of the Danes and began the mixing of the Danes with the Anglo-Saxons.

Though King Alfred reigned during the times of struggle with the Danes, at whose hands the Anglo-Saxons withstood great losses and set backs, time has proven Alfred's reign successful. In the breathers from war with the Danes, the English boasted that a beautiful woman could walk from one end of their Island to the other with a basket of gold on her head and her babe in her arms, and never fear.[558] Alfred read and

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[558] The following, though hyperbole, is a largely true and justifiable response to the intrepidity of Alfred the Great:

> A youthful prince, thirsting for intellectual enjoyments, for domestic happiness, and for the Word of God, and who sought by frequent prayer, for the deliverance from bondage of sin, had ascended the throne of Wessex, in the year 871. Alfred being convinced that Christianity alone could rightly mould a nation, assembled round him the most learned men from all parts of Europe, and was anxious that the English, like the Hebrews, Greeks, and Latins, should possess the Holy Scriptures in their own language. He is the real patron of the biblical work, which indeed constitutes one of his chief titles to fame.

wrote Latin well and, using the Latin alphabet, was the first to put the English language in writing, calling it Anglo-Saxon: the incipient modern written English.

Once the Dane's had settled on the Island and the mixing of their blood with the Anglo-Saxons had begun, they lived their native ideal of a free peasant class, thereby arresting the Anglo-Saxon farming villages' drift toward slave labor through the doctrines of serfdom. Because it was never the custom of the Anglo-Saxons and Danes to enslave those they conquered, but rather to banish or kill them, neither the Anglo-Saxon folk law nor the Danelaw had developed outright slavery. Even though slavery existed among these tribes in fact, neither the folk law of the Anglo-Saxon marauders and settlers nor the Danelaw of the Danish Vikings recognized slavery.

Akin and alike to the folk law of the Anglo-Saxons, the Danes used their folk law in the territories of Britain where they settled. Called *Dane Lagu* (Danelaw), its influence reinforced the *Volkriht* with keener Scandinavian applications of like principles. Due to its fundamental sameness, the Danelaw, over time, merged with the Anglo-Saxons' folk law, tempering the folk law to even stronger levels of personal rights in property and property in rights.[559]

The folk law's zealousness to protect freedom of association in contract had fostered among the Anglo-Danes creative and unique

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After having fought numerous campaigns and battles by land and sea, he died while translating the *Psalms* of David for his subjects.

1 D'AUBIGNÉ, *supra* note 19, at 64.

King Alfred's life is comparable to the life of Israel's King David in that both men devoted themselves to understanding the Word of God written and to the military defense of their country. Two properties of Alfred's life unified his people: his life-long attention to God's Word and his vigilant military organization and campaigns against his people's enemy, the Danish Vikings. After the Dane's made permanent in England their habitation, through Alfred's efforts, the Danes received Christianity. Alfred died at age 50. Asser, the Welsh bishop of Sherborne and personal assistant to King Alfred, recorded most of what we now know of him. *See generally* ASSER, THE LIFE OF KING ALFRED (J.A. Giles trans., 1847) (*circa* A.D. 888).

559 The Angels, Saxon, and Danes, the three tribal groups associated with the common law's introduction into Britain, identified and distinguished themselves according to their ancestors, whether common or distinct. *See generally* BILL COOPER, AFTER THE FLOOD (1995) (examining the "Table of Nations" of *Genesis* 11 as it pertains to the British Isle), *referencing Chronicles of the Early Britons* (*Tysilio Chronicles*), lodged in Bodelian Library, Oxford. Cooper cites renowned archeologist Flinders Petrie's presentation of his paper *Neglected British History* before the assembled British Academy on 7 November 1917. Petrie drew attention to the ancient *Tysilio Chronicle*: a work comprising considerable historical documentary source material that scholars overlook, if not willfully ignore. *See* 8 SIR FINDERS PETRIE, PROCEEDINGS OF THE BRITISH ACADEMY 1–28 (Oxford Univ. Press, n.d.).

arrangements of private relationships. However, the first-century influence of imperial Rome, and then seventh and eighth century influence of the imperial church, had caused the zealousness of the folk law to wane; the Danelaw, however, re-quickened it:

> [Among the Anglo-Dane's] man was bound to man by a most intricate network of rights and duties, which might vary almost indefinitely from shire to shire, and even from village to village. But on the whole the English doctrine was that a free man might choose his lord . . . in return the lord must protect him against encroaching neighbors and back him in the courts of law. What is more, the man might go from one lord to another . . . and when the free men met [as jurors] in the shire or hundred court to decide the rights or wrongs of a matter it was their voice that carried weight . . . .[560]

The Anglo-Danes believed that the tie of man to his lord and the lord to his man is moral and legal; adding to these convictions, the more logical Normans stressed the material and tangible aspects of rights and property. Though initially set back by the material emphasis of Norman feudalism at the expense of moral ideals, the influence of the Anglo-Dane's tradition of free association into the culture of the Norman invaders revived and refined the Anglo-Saxons' freedom of association by mutual agreement, which translated into renewed respect for freedom of contract. In short, the common-law tradition of the conquered Anglo-Saxons and Anglo-Danes conquered their conquerors, the Normans.

The Danish Vikings-turned-yeomen settled parts of Northumbria in the northeast of the England, Mercia in the central region, and East Anglia on the east-central coast. From the Danes, the Anglo-Saxons adopted the *hide* as their standard measurement of land area. Because the Danish tongue was akin to the Anglo-Saxon's and because the Danes—unlike the Anglo-Saxons arriving before them—were never intent on extinguishing those they conquered; in time, the Danish Colonists established business and familial relationships, and mixed with the Anglo-Saxons, becoming a single people with a single understanding of law and government.

As the Scotch-Irish in America, the Danes made no effort to keep their identity and blood distinct. Thus, their willingness to mix wove their customs and ideals into the English fabric, becoming the controlling

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[560] CHURCHILL, *supra* note 62, at xiv.

influence. Moreover, the Danes' customs reinforced the common-law ideals that the Anglo-Saxon raiders had first carried to the Island, but which the Roman occupation had weakened. The common law owes its emphasis upon land holding, real-property law, and a deep-rooted attachment to the soil to the Danes. The Danes also restored the Anglo-Saxon system of measurement based upon the dozen instead of the number ten: *e.g.*, the foot of twelve inches and the *long hundred* of 120 aliquot parts. Moreover, the Danes again stressed that every holder of rights in land is a freeman, regardless of the smallness of his holding or the slightness of his right. Thus, the blood and customs of the Danes worked as alloys, re-tempering the ideals of the Anglo-Saxons' common law and government.

In addition, the descendants of the former Danish Vikings became sea-going merchants to the continent. Once settled in England, the Danes transitioned to traders and merchants with ease because, they—unlike the Anglo-Saxons—remained a seagoing people. Besides enabling movement of goods to and from the continent, the Danes' seafaring, kept them free of fear of strangers, a necessity for those seeking new relationships and markets.[561] On the other hand, by the time the Danes invaded and settled England, the Anglo-Saxons had long-forgotten their seafaring days. The Dane's trading activity added centers of commerce to the benefit of their new Island home.

Moreover, the Danes discovered that if they exercised respect toward the Anglo-Saxon strangers—instead of settling for short-term, abusive contact with them such as murdering and plundering—, long-term and profitable business relationships will develop. The Danes eventually dominated the wool trade between England and the continent;[562] the Danish wool-merchant class in England persisted until recent times.

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[561] The ancient Greeks described sailors as men who had seen too much to believe too much. Few things surprised Danish sailors; though they maintained respect for strangers as unpredictable and dangerous, they were unafraid of strangers. Thus were the Danes, and before them the Anglo-Saxons, and after them, the Normans: all three groups of seafaring adventurers settling into farming, livestock, and merchant pursuits on the Isle of Britain. By challenging the Anglo-Saxons with amphibious invasions, the Danish Vikings incited resurrection the naval arts among the Anglo-Saxons. Beginning with King Alfred's building of a navy to defeat the Danish fleet, England grew into, and remains, a powerful seafaring country. Within 1000 years of Alfred's reign, England ruled the oceans; with her defeat of the Spanish Armada in 1588—having sailed to conquer England at the pope's behest—, England gained the title *Mistress of the Seas*.

[562] The Japanese, after World War II, changed their approach to strangers from short-term gains made by murdering and plundering to seeking extended business relationships, where profit and mutual benefit continued over long periods. Likewise, the Anglo-Saxon adventurers and Danish Vikings transitioned from warring adventurers to commercial traders. Thus, the Anglo-Saxon invader, the Danish Viking, and the Japanese imperialist

In summary, the Danes came to England as Vikings with intent to conquer and plunder the Anglo-Saxons; their armed success, though great, was never complete. After the Danes had driven the Anglo-Saxons to the escarpments and hills in the west of the Island, the Anglo-Saxons rallied and drove the Danes back to the east coast of the Island. Whereupon the Danes embraced Christianity, became one with the Anglo-Saxons and, over time, reinforced the common-law ideal of the freeman of small land holdings, or even none, which stopped the Anglo-Saxons' drift toward manorialism (total domination by the thegn) and outright slave holding. "Long before the Norman Conquest it [the Danish customs] had developed a distinctive form of rural society, which preserved many Scandinavian features, and in which the free man of peasant condition was holding his own successfully against the contemporary drift toward manorialism."[563] "Scandinavian England," writes Churchill, "reared a free peasant population which the burdens of taxation and defense had made difficult in Wessex and English Mercia."[564] Thus, Scandinavian influences strengthened the stability of Anglo-Saxons' farming villages, the building blocks for England's common law and government:[565]

> The Danish Conquest had not been without its effect; but owing to the close relationship in blood and speech that existed

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each discovered that un-neighborly behavior—killing, enslaving, or otherwise abusing the other fellow, his family or property—hampers likelihood of profitable and long-term economic exchange.

The providence of God worked in the Danes' dealings with England. The Danes' establishment of their wool trade in England grew into commerce that made possible the dissemination of Tyndale's first English translation of the Bible from the original tongues. It is also probable that William Tyndale's family was involved in the wool trade, accounting for Tyndale's strong connections with wool traders in England and on the European continent. These merchants enabled Tyndale, financially and logistically, to begin his translation work. Once completed, the wool traders smuggled copies of his English New Testaments back to England hidden in wool bales.

Humphrey Monmouth, a member of "a semisecret society of merchant adventurers, known as the Christian Brethren, had done business in the wool trade with Tyndale's brother, Edward . . . The Christian Brethren ultimately financed Tyndale's work (among other projects), and were a caste which even the most powerful authorities dare not suppress." BOBRICK, *supra* note 316, at 96–98. As American cotton production of the early nineteenth century commanded the world's cotton trade, English wool production, during Tyndale's time, commanded the world's wool trade. *See id.*

[563] F. STENTON, THE DANES IN ENGLAND 13 (1927), *quoted in* CHURCHILL, *supra* note 62, at 82. The Danes strengthened the Anglo-Saxons' traditions of common law and government, expanding, again, its protections to all classes, staying, and reversing, trending deeper into serfdom.

[564] *Id.*

[565] *Id.*

> between the Anglo-Saxons and the Danes, and the consequent ease with which they fused into one people, the Danish addition to the English population may be regarded rather as strengthening the original stock than changing it or turning it in new directions.[566]

§ 3.5
Norman Invaders
Confirm Common Law

American common law is closer to the common law of the ancient Anglo-Saxons than it is to that of the Normans. The Anglo-Saxons, like the Americans, had a more expansive notion of individual liberty . . . [common law is] of origin divine.[567]

Early in 1066, King Edward the Confessor died. Edward had held fast in Christian piety; upon returning from Westminster Abby in January of that year, he suddenly keeled over dead. His only son was a boy living in Hungary, but his son never concerned the Anglo-Saxon nobles for two reasons: common law never demanded an hereditary Crown, but even if it did, Edward's son was without rightful claim to the Crown—under any prior accepted standards. On 6 January 1066, following close after Edward's death, the Witan invited to England's throne Edward's brother-in-law, Harold Godwinson. King Harold, however, never fawned before the Roman bishop; consequently, pope Alexander II determined to oust him and cut a deal with William of Normandy: the pope agreed that upon William's promise to invade England and depose King Harold, he will decree William the only legitimate king of England and commission William's invasion.

To further confuse matters, in mid-September of that year, Norway's King Harold Hadrada—sometimes spelt *Harald*—, appealing to the Anglo-Danish party in England to support his claim of right to the English throne, gained support from Harold Godwinson's brother Tosti and invaded the British Island two miles south of York. Meanwhile, on 26 September 1066, as William made ready to cross the English Channel

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[566] GEORGE PHILLIP KRAPP, MODERN ENGLISH: ITS GROWTH AND PRESENT USE 28–29 (1909).

[567] Justice James Wilson, United States Supreme Court, *quoted in* 73 NW. U.L. REV. 48–52 (1978). Though a country ignores the common law, says Herb Titus, still, that relieves no one's responsibility to observe its precepts. Every person and country, he said, has to do with the common law, because God gives it; they that ignore its principles do so at their peril. Telephone Conversation with Herb Titus, Attorney at Law (24 Sept. 2007).

from Normandy to invade England at the south end of the Island, the Anglo-Saxon King Harold and his regulars marched north to meet the Norwegians. Joined on the way by the fyrd (militia) of West Mercian and East Anglian, the Anglo-Saxons made the 180-mile march to the northeast of England to drive out the Norwegians in only four days. Thus, Harold Godwinson and his Anglo-Saxons surprised Harold Hadrada and his Norwegian invaders south of York at Stamford Bridge.

The day was sweltering; for relief the Norwegians had removed their helmets and chain mail. Unsuspecting that any Anglo-Saxons were within a week's march, they had carried their armor back across Stamford Bridge to their ships along the shore, and stowed it in good order. Upon seeing the Anglo-Saxons approaching, the Norwegians, caught flat-footed and without armor, beat their retreat across Stamford Bridge, leaving a small company of *berserkers*[568] at the Bridge's approach to hold the Anglo-Saxons at bay. Then, while the Norwegians made a show of forming ranks upon the ridge above the river, they sent some of their number to fetch their armor. The Anglo-Saxons, knowing surprise had lent them the upper hand, rushed upon the berserkers to clear the bridge. After much struggle, they slew all the berserkers but one, who single-handedly defended the approach to Stamford Bridge until a resourceful Anglo-Saxon, taking a rowboat, snuck under the bridge and by thrusting a long spear up between the floor planks, slew the berserker. Stamford Bridge now cleared, the Anglo-Saxons poured across it and, charging up the ridge, cut down the invaders, allowing only a few to escape alive, but sparing Harald Hadrada's son, Olaf.

Mopping up quickly, King Harold, without a breather, took his men, by forced march of just over a fortnight, to the south coast to meet William and his army. Harold, knowing he needed fresh reinforcements, sent ahead messengers with word to mobilize the militia or *fyrd*. However, at least two local lords failed to do so;[569] consequently, Harold

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[568] *Berserkers* were Germanic and Scandinavian fighters that somehow moved themselves to madness of indiscriminant violence—whether by becoming a demoniac, by drugs, or both, is unknown. A berserker was most often, though not always, the largest of men. In his fits, the berserker discerned neither friend nor foe; all within his reach, he strained to kill. After even a short fit of aggression, whatever drove the berserker's madness spent him, body and soul, reducing him to faintness and uselessness for at least two or three days. Moreover, while going berserk, the berserker fought without any admirable virtues such as loyalty, conviction, and courage. Berserkers were men debased to crazed animals. After the twelfth century, use of berserkers among the Teutonic tribes is unknown.

[569] The Anglo-Saxon kings' procedure for calling out the militia or *fyrd* was to issue a summons called the *fyrdfare* (literal Anglo-Saxon, for "militia 'a going"). A current comparable military term is *unit mobilization order*.

lacked men enough for an offensive and, thus, took a defensive position on Senlac ridge, near a place called Hastings.

Having landed, William and his Normans assaulted Harold's position time and again. By late afternoon of the day of battle, Harold had driven back all of the Normans' assaults; each time the Normans fell back, their following assault was weaker than their former one. As dusk neared, even without all the fresh auxiliary troops they had counted on, the Anglo-Saxons held the buoyancy of victory. William's archers were almost out of arrows; he wavered to make another assault.

On 14 October 1066, two happenings joined in bringing about the Anglo-Saxons' undoing. Late in the day, Harold's militia (fyrd), lacking the discipline of regulars, took the bait of the enemy's false retreat, broke ranks, and left their defensive position in chase of the fleeing Normans. The Normans, now in command of their prey, flanked them, closed about them, and destroyed them. William then ordered his archers to traject a final arrow shower behind the Norman lines; one of these arrows pierced Harold Godwinson's eye socket, killing him. As was King Ahab of Israel, Harold was felled from a bow "drawn at a venture,"[570] piercing a vital point. As Providence had it, a potshot bowshot from an unknown Norman was the upshot that decided the battle and the future of common law and government.

All during the Anglo-Saxons' four-day, 160-mile march north to Stamford Bridge; their gallant battle against the Norwegian berserkers; their ensuing fight to the death and rout of the Norwegians; their forced march of over 250 miles south to Hastings; and their repelling of William's unrelenting attacks by greater numbers, the Anglo-Saxons had shown mighty grit, looking to King Harold Godwinson for courage. When, however, word of Harold's mortal wound rippled through the Anglo-Saxon's lines, their will faltered. Fatigue from the two forced marches and the two battles to the death overtook them, fading their hard-gained initiative. Still, the Anglo-Saxons, though now leaderless, only ceded Senlac ridge yard by grudging yard, until at last, facing sure death, fled the field; England was lost to the Normans.

The rough-and-ready first principles of the common-law tradition[571] the Anglo-Saxons had carried into England as the *Volkriht* and now

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[570] 1 *Kings* 22:34, 2 *Chronicles* 18:33. לתמו (*latwommow*): by the letters, "to his innocence," viz. the archer's. He shot his bow in ignorance, without aiming at any one in particular.

[571] The common law of England balanced on the scale against the Roman law of Europe's political powers during the eleventh century, swung little weight in the minds of men. Nonetheless, from the common law—at that time called the *Laws of Edward the*

enlivened with Scripture, hung in the balance against William the Conqueror's promise to subject England's common-law courts to Rome and her civil law.[572]

William was a Norwegian; his people, 155 years earlier in A.D. 911, had raided and settled a part of the coast of France, calling it Normandy. His wife Matilda descended from the Anglo-Saxon king, Alfred the Great. Because of William's marital relationship to the Anglo-Saxons through Matilda, he may have claimed a link with her people, bolstering his claim to the English Crown. William did claim that Edward the Confessor had promised to him the English throne. In any event, upon becoming king of England, William straightway declared that he shall observe the laws of Edward the Confessor;[573] thus, the common law stayed in force. The decision of William I. was crucial for England, for her future, and for the United States. By his rejection of the Romanized Norman Law and enforcing the common law, he kept the common-law tradition for future generations and further refinement.

Over 350 years before the Norman invasion, the common law had begun to drift away from individual rights. Attempting to stop this decay, King Alfred the Great had compiled his *Dom-Book* (Book of Judgments), "containing the principle maxims of the common law . . . and forms of judicial proceedings."[574] Soon after, the influence of the Danish settlers directed the common law back to the Jury to increase application of its principles, giving it greater—still yet sure-footed—reach, embracing the smaller landholders and serfs, while focusing on liberty and property rights of every individual.

Confessor—Steven Langton drew the principles for Magna Carta. *See Zachariah* 4:10: "For who has not despised the small things of today? For they shall rejoice."

[572] The Normans, having settled on the coast of France, which they called Normandy, had used and lived by principles of the Roman law for over 100 years. Such was to be expected, for it was the Normans' custom to adopt as their own, the laws of those they have conquered, believing to do so is wise politics. For example, after conquering the Moors in Sicily and the lower Italian peninsula, Roger II and his Normans even ratified and enforced the prevailing Islamic laws practiced there. That the Normans adopted the common law and government of the Anglo-Saxons following their conquest is no surprise; to do so was wise politics. But to top off all, it appears that in Normandy, Rome had worried the Normans weary; William was willing to fight to take up the his home in England with the common law and be shed of the Roman monkey on his back.

[573] William I. never called England's laws *common law* because before, during, and for a couple of centuries after the Norman Conquest, neither the Anglo-Saxons nor the Normans used the phrase "common law" for their tradition of law and government. See generally § 3.7.1 of this book (discussing the origin and uses of the phrase *common law*).

[574] *Id.* at 65. Alfred's *Dom-Book* was extant until the time of Edward IV. but is now lost. The *Laws of Edward the Elder*, Alfred's son, include an injunction to follow his father's *Dom-Book*.

While on the continent, the Dane's understanding of life, law, and government had remained untouched by Roman order—administrative efficiency driven by expediency—; thus, their ideals remained strong. Once in England, the Dane's were uncommitted to their tribal purity, mixing freely with the Anglo-Saxons; thus, their presence and ideals were pervasive and strong. As the Anglo-Saxons applied the customs of the Dane's, that which was good of the Dane's Law bolstered that which was good of the Laws of King Alfred.[575] King Alfred—by reducing the Anglo-Saxon tongue to writing, translating the Scriptures into Anglo-Saxon, and writing in his *Laws* the accord between Scripture and the common-law principles—had reversed the waning of the common law that had begun with the leaven of Roman occupation, from the first through the fifth century. Then the energy of the Dane's, quickened by their strong ideals of individual property rights, allowed the common law to run to all classes.

The people of England, however, practiced the common law using three separate variations: the *Mercen-Lage* (Mercian laws) of the midland counties, reaching west to Wales; the *West-Saxon-Lage* (laws of the West Saxons) of the counties in the south and west, from Kent to Devonshire; and the *Dane-Lage* (Danish law) of the eastern coast and running west through the remainder of the midlands. From these three customs of shared basic tenants, Edward the Confessor had "extracted one uniform law or digest of laws to be observed throughout the whole kingdom."[576] Thus, by the time of the Norman invasion, the common law was in fundamental principal, the same throughout England. Such was the common law William found in England and kept in force.

In choosing the laws of Edward the Confessor instead of Norman law, William I. proceeded with due thought; his decision was deliberate. William knew that after the Goths and Franks overran Spain and France, they allowed former Roman subjects to retain civil law, while they used their own law. William saw the disorder that followed and determined to avoid such uncertainty in Norman England. William, therefore, never

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[575] *See id.*

[576] *See* 1 BLACKSTONE, *supra* note 12, at 65. About the same time of Edward the Confessor and the Norman Conquest of Britain, the Swedes compiled in writing their common law out of the customs of Sweden's separate provinces, as established by the *laghman* (lawman) of each province, and entitled it *Land's Lagh*, "being analogous to the common law of England." *Id.* at 66. The common law of the Anglo-Saxons is not unique among the Teutonic tribes, but is unique in that it is the version of the folk law that emerged from the continent intact and then spread, with immeasurable good effect, to places such as North America, Australia, New Zealand, and to a lesser degree, places such as India and Hong Kong.

subjected England to civil law, but kept the common law for the protection of both Anglo-Saxon and Norman.

Though the Normans had learned administrative skills in law and government from the Roman Church, their Scandinavian character, nevertheless, clung to them. As the Anglo-Saxons and the Danes, the Normans were never in fundamental character legislators and bureaucrats: instead, by centuries of practice, their ideals of law and government revolved around their courts. Consequently, the Normans preserved the centrality of the Anglo-Saxons' courts and the Jury, while also strengthening the common-law courts with their administrative skills.

For example, every free Anglo-Saxon was obliged to serve on the Jury when summoned; William I., recognizing the strength of the local organization of county, hundred, and tithing, freely issued writs to local sheriffs to empanel the Jury to decide the facts concerning local breaches of the peace. In the common-law tradition, the authority and power of the individual juror in deciding local matters remains the counter balance to central government. "Whatever else changed," says Churchill, "they [the commoners] were always there" serving as jurors, granting or withholding approval of the desires of central government in local cases.

Earlier, when the Anglo-Saxons had overrun Britain, civil law, though present in England, was weak because the Roman population in Britain was sparse. In England, the Romans, and then the Roman Church and her courts, used civil law, but hardly anyone else did. Further, in the British Church of the pre-Norman invasion, the civil law never decisively established itself. Until the seventh century, Christianity in Britain—from Ireland, through the counties palatine on Scotland's border, and to Land's End in Cornwall—operated according to a theology, polity, and law distinct from Rome's.[577]

During Rome's occupation of 43 B.C. through A.D. 407, and again through the Roman priesthood's influence after the time of the Venerable Bede and the Synod of Whitby (A.D. 663–664), the civil law had encroached upon Britain, but never decisively spread its tentacles over the Island. Infusions of Christianity, even during the incipient Christian decades, stifled the Roman Empire's civil law, its emperor worship, and

[577] Before September of A.D. 672, Britain's inhabitants had enjoyed ecclesiastic and political autonomy. In that year, at the Whitby conference and at the council at Hertford, a commission of Roman priests, by presenting the canon law and demanding its reception by solemn oath, seduced much of the British Church into uniformity with Rome and her civil-canon law.

other Babylonian trappings.[578] Moreover, the building of Roman *cities*—a foundation stone of Babylonian religion, civil law, and government—failed in Britannia, keeping Rome from enforcing her urban (civil) law.[579] The Christian conversion of the Anglo-Saxon kings—beginning with King Kenwalk,[580] King Alfred, and those following, including the Danish kings—coupled with England's geographic separation from the continent, further insulated the Island from lasting civil-law doctrines.[581]

Rome blessed William's invasion of England because he promised to pay England's tribute back to Rome; after his conquest, however, he dallied. Though William paid lip service to Rome, he refused to bow to

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[578] Along with Christianity, Rome enabled sophisticated Babylonian influences to pervade her provinces, including Britain:

> [Roman legionnaires] from Asia Minor, peering through the mists at Scottish raiders, preserved the worship of Mithras along the Roman Wall. The cult of the Persian Sun-god spread widely throughout the Roman world, appealing especially to soldiers, merchants, and administrators. During the third century, Mithraism was a powerful rival to Christianity, and, as was revealed by the impressive temple discovered at Walbrook in 1954, it could count many believers in Roman London.

CHURCHILL, *supra* note 62, at 26.

[579] Though humiliating, Rome's military defeat and domination of the Britains was a lesser danger than Roman hedonism. According to Tacitus, Rome's subjection of the Britains came through seduction of the Britains, step by step, into the hedonistic Roman lifestyle, beginning with the British chieftains and well-to-do classes and trickling down to all Britains. The remaining Britains, aching to conform to the upper economic classes, bowed to seduction also. By the overtures of the Roman governor Agricola, the Britains adopted Roman fashions, including the Toga. "Step by step they were led to practices which disposed to vice—the lounge, the bath, the elegant banquet. All this in their ignorance they called civilization, when it was part of their servitude." *Id.* at 22–23.

Although Roman occupation brought dangerous influences to Britain, it also brought the seed of the Word of God, technology, trade, and activities incident to these. As a practical matter, however, Roman law and government remained seated in Rome, reaching out to touch Britain only from Rome; because, in spite of her efforts, Rome never successfully duplicate her cities in Britain: the indispensable ingredient for effective administration of civil law's imperial power. On the continent, the provincial Roman urban centers were Rome's basis for the establishment of Rome's law, from which the arm of her law reached out and dominated the provincials.

[580] King Kenwalk (A.D. 643–672) was the first Christian king of Wessex. He erected Winchester Cathedral.

[581] Historians have contended that Rome has never achieved decisive subjection of the English Church. *See generally* D'AUBIGNÉ, *supra* note 19 (supporting the proposition that the Church in England or Britain has never concluded herself under civil-canon law through conquest by the Roman Empire or Roman Church). On 23 July 1529, at the ecclesiastic tribunal concerning the first marriage of Henry VIII., the audacious Duke of Suffolk spoke the ancient and then prevailing attitude of peers and the people alike, "[T]he old saying is confirmed today, that no cardinal has ever brought good to England." *Id.* at 414. The Duke's words indicate that Englishmen had been familiar with this saying since days of yore.

the pope's demand to hold England in fief,[582] i.e., as the pope's personal possession. By confirming the common law, William I. denied civil law's plenary power over England, further angering the Roman pontiff.[583] The spirit of Rome's Empire had arisen from the ashes cloaked with the priestly robes of the Roman Church; by the time of the Norman Conquest, it had a legislating pope that combined Roman imperialism with canon and administrative law under a Christian banner. As Rome's imperial spirit looked to the northwest, she remembered; the Norman Conquest renewed Rome's hope of total dominance of England. Though William I. confirmed the Laws of Edward the Confessor (the common law), he also paid homage to Rome, at least in form, by allowing Roman priests to operate Rome's canon-law tribunals in England.

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[582] *Fief* stems from the Anglo-Saxon *feoh*, signifying "cattle" because, since ancient times on the continent, cattle were a chief mark of wealth. *Feoh* later came to signify property and rights of all kinds. As England developed a monetary economy, the pronunciation of *feoh* slurred into *fee* and came to mean money payments for privileges, goods, or services. Today, common lawyers use the term "fee" to describe full ownership of all rights in a parcel of real property. For example, a common lawyer says that *A* holds Black acre in *fee* (fief) for *B*. Thus, for William I. to have held England in *fee* (fief) for the Roman pontiff, was to submit England and her people to the pope as property, conditioning England's enjoyment of her productivity upon whether William I. made regular tribute payments to Rome, thereby reducing England's enjoyment of her liberties to mere privileges from the pope.

Even at this time, Hildebrand, later to become pope Gregory VII, held great power over the Roman Church and had already persuaded William I. to accept his over-reaching and radical program in Normandy. In England, however, William I. was shrewder than he had been in Normandy: with the right hand he allowed more of Rome's ecclesiastic courts in England; while with the left hand he removed Rome's priests from the common-law courts and granted the common-law courts subject-matter jurisdiction over matters held by the Roman imperial church. These actions were monumental. In addition, William I. laid down the rules entitled *Triple Concordat*, insuring ultimate English control over Rome's activities within England. *See* 3 ILL. L. REV. 347 (1908–1909).

By limiting Rome's law in England, William I. set a precedent that provided legal conviction against Rome's unrelenting attempts to intrude and plunder. In 1366, during the days of John Wyclif, Urbane V demanded an annual tribute payment from the English Crown of 700 marks. This amount included arrearages from the time of Rome's forcing of King John into vassalage, well over a century before. "Edward referred the claim to Parliament, which rejected it without hesitation, on the ground that John had no power to bind the realm without its assent . . . ." 1 JOHN WYCLIF, THE ENGLISH WORKS OF WYCLIF HITHERTO UNPRINTED vi (F.D. Matthew ed., Trüubner, photo. reprint 2004) (1880).

In 1374, Pope Gregory XII repeated the demand, commanding in addition that King Edward III. appear before the pope and explain his disobedience. In making these demands, the pope, in effect, ordered the King to ignore Parliament's advice and consent. Edward III., however, deferred to Parliament, which promptly refused compliance. Rome then dispatched an agent—attended by an entourage of servants and a battery of accountants—to collect Rome's alleged tribute. Wyclif, struck with Rome's arrogance, took up his pen in defense of England's spiritual and political independence from Rome. The discharge of Wyclif's pen worked as acid against Rome and her civil law. *See id.* at v–vii.

[583] On Christmas Day 1066, William, by his oath of coronation at Westminster, confirmed the *Laws of Edward the Confessor* (the common law) .

Following the Norman Conquest, however, the Normans checked the encroachment of Rome's civil law in England by making two changes in the common-law courts: first, they removed Roman priests from shire (county) judgeships; second, they gave the shire courts common-law jurisdiction over ecclesiastic matters that had been under Roman canon law: adoption, marriage, wills, estates, and trusts. By removing jurisdiction over these matters from Rome's ecclesiastic courts to the common-law courts, the Normans broke Rome's monopoly, preventing Rome's control of trusts, estates, and wills, through which flowed the profits and rents of England's farmland and other real estate. Roman priests serving as judges had applied the only law they knew: Roman civil (canon) law. Thus, by removing Rome's judges, the Normans removed the power of Rome's law.

England now had two kinds of courts operating according to two traditions: common law and civil law. These two courts increasingly locked horns in the struggle for power over the affairs and property of England, culminating in the war between Parliament and the royalists, again in the New World in the French and Indian War, and again in the American War of Independence: all struggles in which the common law prevailed; out of which the common law came forth stronger.

In his choice of the common law, William I. kept his liking for Norman administration. Thus, William set out a plan for Anglo-Saxon courts in two parts: first, he removed felony jurisdiction from the hundred courts to the shire (county) courts; second, he dispatched sheriffs (shire-*reeves* or "agents" of the king in the shires) to the shire courts, insuring foremost, empanelling of juries according to the course of the common law. By moving felony jurisdiction to the shire courts, William sought to keep high crimes out of the Roman Church tribunals' reach. Of most significance to the common law, these sheriffs were not judges; thus, the Jury remained the sole judges of the facts and of the application of the law. Further, William's sheriffs encouraged the use of case precedent, which, in turn, encouraged recordation of written court opinions, enabling finer distinctions in harmonious application of the common law throughout England.

In the Anglo-Saxon villages, the "lord of the manor" (Anglo-Saxon: *thegn*) still sometimes sat as judge in the manor court. Most often, however, those holding the same kind of rights in land as the defendant—called his peers—decided cases in *moot* (a meeting together), allowing neither government nor another, to move against the defendant's life,

liberty, or property without unanimous consent of his peers.[584] At bottom, the actions of William I., while strengthening its process, effected little change to the unwritten common-law tradition.

After the Norman Conquest, life in England went on in accord with the common-law tradition. As modern American counties, the shires (later called counties) comprised *hundreds* (later called townships), with each hundred containing one or more villages and a local manorial court from which appeal was had to the shire court. At an earlier time in Anglo-Saxon Britain, the separate counties—*e.g.*, the South Saxons (Sussex), Kent, the East Saxons (Essex), the East Angels (Suffolk and Norfolk)—had been separate and sovereign kingdoms in confederacy, roughly akin to America's separate states. Consequently, as a practical matter, England's county courts were the supreme court of last resort, and remained so after the Norman Conquest. Therefore, because the county courts had appellate jurisdiction of the manorial courts, removal of the Roman priests from the county courts also removed the influence of Roman law from English appellate courts of last resort.

The Norman tradition of land tenure, now in England, remained personal, with reciprocal rights and duties between a tenant-holder and his sub-tenant, in oath and loyalty. To this, William I. added the landholder's duty to provide, in exchange for land tenure, trained knights, outfitted for military service, in proportion to the amount of land held. The Anglo-Danish ideals of freedom of association, on the other hand, were stronger than that of the Normans. In the event a tenant-holder breaches his covenant with his sub-tenant, the Dane's law recognized the sub-tenant's right to transfer his oath and his land from that lord to another; but Norman feudalism required that the sub-tenant's land hold remain with his lord. Despite these differences, once they made administrative adjustments, Anglo-Saxon landholders were content to keep their land holds, their common law, their duties as jurors, and access to the courts of hundred (township) and the shire (county). Furthermore, the Anglo-Saxons proved willing to defend their customs and courts: their *fyrd* remained the organized militia in each county; the fyrd obeyed every summons of William I. to mobilize (*fyrdfare*: militia 'a going) and take to the field.

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[584] Following Magna Carta, the United States Constitution, by guarantying the common-law trial by jury (a panel of one's peers for judges), also affirmed this custom. "[I]n Magna Carta," says Spooner, "[trial by jury] is more than once insisted on as the principal bulwark of our liberties; but especially chap. 29. That no freeman shall be hurt in either his person or property, '*nisi per legale judicium parium suorum vel per legem terrae*' [unless by the lawful judgment of his peers, or by the law of the land]." 3 WILLIAM BLACKSTONE, COMMENTARIES *350. *See also* U.S. CONST. amend. VI.

The arrival of the Normans in England occurred during the height of the pope's drive to dominate the world. Just after the Norman invasion of England, the bishop of Rome declared himself God's sovereign on earth with plenary power over all other kings. Later, armed with this notion and Justinian's Code to bolster it, Rome again tried to assert the civil law in England. Nevertheless, in the view of King Henry II., the common law was best for England: not Rome's pope, the holy Roman emperor, or Rome's canon law. Henry rested his argument on Anglo-Saxon first principles: the king of England's authority, said Henry, is subject to the advice and consent of the English nobility, not an Italian bishop.[585] Nevertheless, over time, the Roman popes persisted in enforcing civil law in England, attempting to rule through Rome's legates. The pope appointed priests from continental Europe, and especially France, to salaried positions in England—even while England was at war with France. These foreign priests collected large salaries from England, without ever setting foot on English soil.[586] English animosity grew.

§ 3.6
Why the Common Law Persisted in England

These are the laws, that so vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman Empire over most of the continent: states that have lost, and upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased.[587]

That the common law would persist in England up to and through the Norman Conquest was, from the human perspective, unlikely. Nevertheless, it did. King Alfred having compiled the leading principles of the common law and the Danes having strengthened them, Edward

[585] Henry II. was king from 1154 to 1189. Freckled, redheaded, bowlegged, energetic of personality, and forever concerned about his weight, Henry gave close attention to his duties. By encouraging the fashioning of writs that allowed those in need of legal remedies ready access to the courts, he labored to make the common-law courts the center of English government. Because of his indefatigable efforts, history affectionately—though inaccurately—calls Henry II. the father of the common law. Indeed, with insuppressible verve, Henry, encouraged, nurtured, and defined the common law; but never begat it. The common law already begotten, the work of Henry II. entrenched it in England.

[586] Foreign Roman church legates ruling England from foreign lands such as France—collecting tribute but never setting foot on English soil—, thought themselves to bear the pope's imperial dignity. One of the pope's legates demanded that Edward III. kiss his foot, to which Edward replied, "The King of England licks no man's boots."

[587] 1 BLACKSTONE, *supra* note 12, at 65.

gathered them again into a body of maxims—calling them the Laws of Edward the Confessor—, affirmed and reissued them by popular demand.

By the seventh century, imperial Rome had brought her civil law to the Britain by two channels: the imperial Roman state and the imperial church, but the civil law never prevailed through either. Because Rome never built on the Island a successful imperial city—the most fundamental feature of the civil-law system—, she never overcame the power of Anglo-Saxon and Anglo-Dane farming villages with their local courts of the Jury. Because the imperial priesthood never received complete submission from those on the Island, Britain always had outposts, and much of the time imposts, where the faithful studied the Scriptures and, once able, put them in the native tongues. Rome's Code, however, remained in Latin and thus, at a disadvantage.

The benefits of the common law's first principles find their lineal roots in the *Volkriht*, or people's law, of the Angels, Saxons, and Danes (Jutes): tribes that dwelt in, about, and adjacent to the peninsular region of modern Denmark, anciently known as Jutland. Before migrating to England, these tribes had remained untouched by Rome's imperial culture, which preserved them from unbridled dictatorial power, an innate potential of Roman civil law.[588]

In A.D. 407, Rome pulled her legions out of Britain to meet the invasions of the Germanic tribes on her continental frontiers. Thereafter, the Angels and Saxons, followed in the ninth century by the Danes, migrated to the Isle of Britain in great numbers. These tribes brought with them the tradition of law and government they had known as non-commerce, non-city dwelling tribes: the Anglo-Saxons' *Volkriht* (Folk law) and the *Dane Lague* (Danelaw). Once in Britain, they began with sensible ideals for limited government, even though the divine substance necessary to sustain these ideals was lacking.[589]

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[588] See generally § 2.12 of this book (discussing the lure of imperial Rome's civil law to the Germanic tribes). In 9 B.C., after Rome had waged a costly campaign against the Germanic tribes north of the Rhine River, the German general Arminius—later known as Hermann—defeated the Roman legions, driving them out of Saxon territory and below the Rhine.

[589] The early Romans, having founded their city with ideals of law and government akin to those of the Anglo-Saxons, devolved into emperor worship. Likewise, Israel began its nationhood in the land of Canaan with ideals of self-government consisting only of judges (שפטים, *shaphatim*: Hebrew masculine plural noun, "judges"). *See generally Judges* (presenting accounts of the circumstances surrounding these judges' adventures and exploits, successes and failures). At the time of these Judges, Israel had no legislature or human king; God desires for His people this simplicity of government, centered on the courts. God had provided, measured, balanced, perfected, and recorded His standard of written law and government for His people Israel; those familiar with it know that it is neither legalistic nor harsh. Application of its principles requires analogy, direct inference,

The Anglo-Saxons and Danes recognized that law is timeless and thus unchanged from eternity past; Scripture brought a preserving and expanding influence to this first principle of law and government. Consequently, the fundamental processes of common law operated with even more vigor. Further, it remained the task of courts of jurors to discover the facts, the law, and its particular application, instead of manufacturing these or accepting them from a code. Moreover, the first principles of the folk law—*e.g.*, fair play, due process, the right to trial by jury, independence of the judiciary, and a limited executive—, were consonant with Scripture. Thus, Scripture, through its effect upon the consciences of those living in the wake of the Anglo-Saxon and Dane migrations, reinforced these first principles; thereby, the common law has persisted.

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and equity controlled by the illumination of God's Spirit. Having God's Word, Israel needed no human legislature. God, having provided statutes, judgments, and case examples for precedent, was their Lawgiver.

God's law being merciful and good, Jesus corrected His disciples, saying that He came to establish the law, not destroy it and that His burdens are light because He has taken the curse of the law upon Himself on man's behalf. The curses of God's law satisfied, the blessings of the law remain to God's people. God states that an individual will remain within God's temporal protection as he observes God's standards by following the way God has pointed out (*Torah*).

In kindred spirit and motivated by natural inclination, American frontiersmen always established courts before establishing any other government office. These early inhabitants knew that by nature they were able to discern right from wrong, articulate the difference, and enforce their own judgments. Nothing more was necessary; these things they did. See generally ROSCOE POUND, COMPARATIVE LAW (n.d.), for lively examples of the American frontier's rough-and-ready methods for discerning law and its application: from Shawneetown, Illinois to the mining camps of California. "The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues." Hinish v. Meyer & Frank Co., 166 Or. 482, 113 P. 2d 483, at 447.

The civil-law tradition recognizes law only in legislation: first, the state gives the Code; then, it sets up tribunals to enforce the Code's commands. Even in a civil-law country having no officially enacted code—*e.g.*, South Africa and societies observing the civil law of neighboring societies (*gemeines recht*)—, the courts cite to the language of Justinian's Code because the authority of the Code is presumed. *Gemeines recht* signifies a people's observance of civil law that has arisen spontaneously from the influence of neighboring societies that follow an enacted civil-law Code. *See* LON L. FULLER, ANATOMY OF THE LAW 133 (1968).

The common-law tradition recognizes that true law and its applications already exist. The common-law, thus, establishes courts regardless of whether government has enacted a code because with or without legislation, all men remain responsible to recognize and observe right and wrong (law). Further, legislation is often confusing and at times unlawful. In common-law countries, its application remains subject to review by judges and jurors. When a plaintiff brings a law before the court to challenge its lawfulness, the court is responsible to examine the law and to state in writing for the contemplation of others, its reasons for believing that the law in question is lawful or unlawful; jurors are responsible to declare the lawfulness of laws as applied in the case before them.

Indeed, during history's course, other pagans besides the Anglo-Saxons and Danes—nonetheless, all creations out of God's imagination and stamped with His image—have discerned the advantages of limited government, wrote about limited government, identified its precepts, tried to implement its principles, and even saw that mankind's ability to recognize these is innate:

> There exists a law, not written down anywhere, but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition.[590]

From the republican experiments in Greece to the founding of Rome, the initiators of these innate ideals, lacking the steadfast power necessary to enjoy limited government, all eventually aborted their experiments where they conceived them:

> Popular governments had existed, but also mixed and federal governments, but there had been no limited government, no state the circumference of whose authority had been defined by a force external to its own. That was the great problem which philosophy had raised, and which no statesmanship had been able to solve. Those who proclaimed the existence of a higher authority had indeed drawn a metaphysical barrier before the governments, but they had not known how to make it real. All that Socrates could effect by way of protest against tyranny of the reformed democracy was to die for his convictions. But . . . *our Lord not only delivered the precept, but created the force to execute it . . . to reduce all political authority to defined limits* . . . an aspiration of patient reasoners . . . The

[590] CICERO, SELECTED POLITICAL SPEECHES 222 (M. Grant trans., 1969). Cicero's statement is extra-biblical support, in addition to the proofs that Paul the apostle provides in *Romans* 2:14–15. All men can know, by nature, right from wrong. Once realized, however, not all men are able to act upon such knowledge. See generally § 5.1.2 of this book (providing an exposition of *Romans* 2:14–15 and discussion of *natural law* as the universal capability to discern good from evil).

> new law . . . gave to liberty a meaning and a value it had not possessed . . . .[591]

The seeds of freedom are latent in the minds of all members of Adam's fallen race. Even though shadowed in sin, given the right conditions, these seeds will germinate. In his fallen condition, however, man remains prone to the cares of this present world, which—coupled with lack of reliance upon God—tempt him to concede his freedom to the state's expedience and his immediate ease. In short, he lacks the steadfast zeal of mind that stops the choking out of freedom. Fear of displeasing others, fear of poverty, and fear of failure; the lust of the flesh, the eyes, and the false boast of possessions[592] all hamper the individual's potential, keeping him from possessing, in confidence, that which God has for him. "Fear, or foolishness, impels him," writes Kipling, "ere he lay the wicked low, [t]o concede some form of trial even to his fiercest foe."

Failed experiments of limited government have strewn the highways of human history with wreckages and carcasses. These experimental forms of government, using common-law-like principles, gave only a weak glimpse of freedom in the mind's eye. Though proper, without the substance of freedom with which to fill these forms,[593] they were no more

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[591] ACTON, ESSAY ON FREEDOM AND POWER 56–57 (1949) (emphasis added). Advancing the progress made by those preceding her, America has carried the ideal of Christian liberty further than has any other nation; it remains her duty to carry it further.

[592] *See* 1 *John* 2:16. *η αλαζονεια του βιου* (*a aladzoneia tou biou*): Spenser coined the word "braggadocio," which sums up the sense of this phrase. RICHARD CHENEVIX TRENCH, SYNONYMS OF THE NEW TESTAMENT 100 (photo. reprint 1953) (1880). *Aladzoneia* signifies the braggart's absurd attempt to make that which is not his, his, by boasting that it is his. Against such an one, God sets himself in battle array (*αντιτασσεται: antitassetai*). *See James* 4:6, 1 *Peter* 5:5, *Proverbs* 3:34. First used in the military sense of "battle array," reporters of civil-law proceedings later used *antitassetai* to denote parties standing opposite, much as common-law courts use the term *versus* to signify the adversarial relationship between the parties. *Antitassetai* occurs twice in The Oxrhynchus Papyri from A.D. 136. *Cited in* JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 49 (1930). Because the lowly braggart lusts to take that which God has chosen never to give (His glory), God marshals his forces against him.

[593] The substance of liberty necessary to fill the proper forms of government is *the* Truth: the person of Jesus Christ—the only person rightfully at once, the medium and the message. Christ conditions the experience of liberty upon abiding in His Word, "*If* you abide in my word, *then* you are truly my disciples [*μαθητης* (*mathaytays*): a learner who follows the teaching *and* the teacher]; consequently, you shall know [*γινωσκω* (*gi-knowsko*): knowledge got from someone through intimate experience with that person] the Truth, and the Truth shall free you." *John* 8:31–32. Christ, being the Truth, is the Great Liberator. Wishing, hoping, longing, planning, and scheming to be free will never free any person from the greatest enslavement: bondage to sin. Only by gaining experiential

than costly exercises in futility. Men slowly but surely abandoned them in the wake of fear and insecurity followed by the plea of "necessity" which, says Pitt, "is the plea of every infringement of human liberty."

Following the transplantation of the Anglo-Saxons' *Volkriht* to Britain, the infusion of the Scriptures coupled with the animating—and even compelling—power of God's Spirit, allowed growth of common-law ideals. The aspirations of God's Word quickened by God's Spirit yielded the audacious activity necessary to move the common-law tradition ahead. Basic to the strength of the common law was its procedure, now known as due process. Magna Carta calls it the *law of the land*:[594] the processes of the courts and government owed to each person, intended to slow the operation of the judicial and governmental machinery, in order to give ample opportunity to discern mistakes and nefarious activity, and assuring that even the weakest will never be browbeaten and broken contrary to the law.[595]

"[T]he basis of the American judicial, and indeed the basis of any civilized system of jurisprudence," says Mr. Justice Wilson, "is the common law."[596] Further, Justice Wilson distinguished the American ideals of common law from that of the Normans:

> American common law is closer to the common law of the ancient Anglo-Saxons than it is to that of the Normans. The Anglo-Saxons, like the Americans, had a more expansive notion of individual liberty . . . [T]he common law is of origin divine.[597]

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knowledge of Christ—only possible through God's Word—will God liberate men and women. Without a critical mass of men and women holding the substance of truth and infusing it into the forms of the common-law first principles, these truths will become as burdensome as the dead weight of a lifeless body.

[594] See generally § 5.1.5.3 of this book (discussing the Magna Carta's phrase, *law of the land*, meaning common-law due process).

[595] At bottom, to the accused, due process means that the government must provide full (fitting and timely) notice of the crime leveled against him and a genuine opportunity to answer and present his defense. Such *genuine opportunity* includes provision of ample information to fashion his defense and plenty of time to do so. See generally *id.* (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as an example of due-process violations driven by judicial passion borne of envy).

[596] Charge of United States Supreme Court Justice James Wilson to a federal Grand Jury, July of 1793. The common law of England traces even further back of Anglo-Saxon England to the continent. Beyond that, however, the trace appears disconnected.

[597] *Quoted in* 73 NW. U.L. REV. 48–52 (1978). In July of 1793, in his charge to a Philadelphia federal Grand Jury in the case of Gideon Henfield, Justice James Wilson of the United States Supreme Court revealed the common law's able talent to bring details of the civil law under its controlling principles. No matter what other law the common law

§ 3.7
Common Law's Resistance to Civil Law

[T]he Jesuits . . . planned to recapture England for the papacy. A school had been set up at Douai on the French coast where men could be trained by the Jesuits to minister secretly to the followers of the pope in England. The pope then enlisted the aid of Phillip of Spain . . . In 1588 he gathered a great fleet known as the Spanish Armada and sailed against England.[598]

After the Norman invasion of 1066, Rome devised schemes to supplant England's common law with civil law by three means: by manipulation through politics, by seduction through the Church, and by force through lawless police action and military invasion.[599] By the seventeenth century, Scripture had tempered the common-law precepts in the English conscience, enabling England to withstand the civil law's coming attempts to subvert its foundations by covert intellectual seduction and overt military attack.

Though Britain's dealings with the powers on the continent were unavoidable, the Island provided enough geographic insulation from the mainland to keep the Roman civil law from supplanting the common law. Respecting religion, law, and government, Rome signified to England what Babylon signified to Israel: the antagonistic principle. Englishmen considered Romish religion, canon law, and civil law contrary to Christianity, the Scriptures, and their common law.

Because of civil law's influence in Normandy, the Norman monarchy in England exercised more power than had the Anglo-Saxon monarchy. Because William I., however, affirmed the common law following his conquest, England's monarchy remained limited. Some English monarchs did labor to obtain absolute powers; ultimately, however, they all failed. Since Anglo-Saxon times, the law has bound the kings of England as much as it has bound other Englishmen. Even thegns ruled

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associates with, says Justice Wilson, the helpful particulars of that different body of law will come under control of the common law's first principles, which will use them for nourishment. The common law is universally applicable and, by its nature, will subject to its principles any other law which it assimilates. For example, pursuant to the universal applicability of common-law first principles, the Constitution vests Congress with power to punish "Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

[598] EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 361–62 (1979).

[599] In common-law countries, schemes to supplant common law keep on: encroachment through political expedience; international tribunals and administrative law; seduction; religious promises of utopian tranquility; and lawless force used against law-abiding citizens. See generally § 6.3 of this book (discussing administrative law's civil-law features and goals).

their manors by consent of the local Witan drawn from the tithing, the hundred, and the shire; moreover, even the Jury of the hundred and of the shire sometimes found against the desires of the Crown.

Though kings balked at the idea, at bottom, all understood that the king was subject to the law; the law confined his authority to the advice and consent of the nobles. Early on, William I.—in further assurance of his commitment to the common law and to inculcate good faith while distributing power—recognized the Anglo-Saxons' requirement that each able-bodied freeman arm himself to insure the peace. The common law required every real property owner and shopkeeper in England to keep handy a long bow and at least forty arrows.[600]

Just over 150 years following the Norman Conquest, the nobles demanded that King John sign Magna Carta, thereby reaffirming that it is unlawful for the Crown to levy taxes without the nobility's consent.[601] Then, during the seventeenth century, Charles I., though in violation of Magna Carta, tried to levy taxes without Parliament's consent. Whereupon, Parliament tried him for treason, convicted him, and beheaded him. Magna Carta also forbade the king from harming any freeman except by consent of that man's peers: independent jurymen of the same standing and station as the accused.[602]

Against the work of Henry II. (reigned 1154–1189) to make standard the common-law system of writs and recording of judicial opinions, both Thomas Beckett and the civil law became Rome's tools meant for Roman oppression. Henry, Beckett's one-time friend, suffered the frailties of humanity, but saw the excellence of English law over civil law; gifted with overwhelming energy, he attended to the weightier matters of England's welfare. Henry's focus in his struggle with Beckett was the triumph in England of the common-law courts over the Roman Church's civil-canon law tribunals. For Henry, the choice was clear: the common law recognized authority and power in the hands of the Jury; the civil law transferred power to the hands of the pope in Rome.

Then, by taking steps that refined the common law as it progressed, Henry strengthened and preserved the common law for future generations. During his administration, he insisted that the courts

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[600] In like spirit, the Statute of Winchester, later passed in the thirteenth year of Edward I. (1285), also attacked public disorder by ratifying the old Anglo-Saxon laws requiring every able-bodied man to provide himself with arms and armor to aid in keeping the peace. In 1827, the Statute of 7 & 8 Geo. IV., c. 27 repealed this law, replacing it with a Criminal Code and government enforcement.

[601] *See* MAGNA CARTA ch. 12.

[602] *See id.* ch. 37. See also generally §§ 4.3—4.3.7 of this book (discussing the common-law Jury).

hammer out and fashion all of the major writs and forms of action that now are the basis of modern common law procedural customs and substance. Throughout England's courts, Henry II. further made standard the use of writs,[603] record keeping, and recordation of case opinions rendered, for access as precedent authority in future litigation. With a system of mandatory record keeping of judicial findings for ready access, the courts preserved in writing the unwritten customs through case precedents, allowing scrutiny, precision, and consistency in application. Thus, at Henry's behest, *stare decisis*—the common law's polestar and claim to sure-footedness—now rested custom on the acuteness of written articulation.

To be sure, William I. had adopted the legal customs and courts of the Anglo-Saxons and then transferred much of the subject-matter jurisdiction from Rome's tribunals to the common-law courts; but Henry II. set about to insure the common-law courts' jurisdiction against Rome's civil and canon law. In doing so, Henry took a conservative approach: stepping gingerly, he remained careful to respect the existing forms, while increasing the application of old principles to additional problems; thus, he recognized the common law's principles, defined them, and then expanded their use.

For example, Henry delineated the Anglo-Saxon concept of breaking another's Peace—i.e., *good order* of one's property and affairs: consonant with the Hebrew's *shalom*[604]—into two categories of offences: offences against any man's peace and offences against the King's Peace. The King's Peace, under the Anglo-Saxon's limited kingship, embraced the person of the king and his property. Thus, violations of the King's Peace were only offenses done in the king's presence, on the king's highway, or on royal lands. In addition, however, each man had his own Peace; just as it was an offense against the King to break the King's Peace, it was an offense against any other man to break that man's Peace, i.e., to encroach upon the rights of his person or his property. In modern terms, such

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[603] *Writ* is an archaic form of the English *write* and a common-law term of significant meaning: a written order issued by a court to do a certain act. For example, upper courts issue orders commanding lower courts to certify the record of a case (writ of certiorari), to convey the record of a case to a higher court for appellate review (writ of error), to do its duty (writ of mandamus), or to command a jural entity, such as a city or county, give answer by what authority has taken a certain action (writ quo warranto).

[604] See generally app. 3 of this book (discussing שלום: *shalom*, the Hebrew term denoting the proper ordering of one's affairs amidst the disorder and confusion of conflict and struggle).

trespasses upon another's Peace are common-law torts: *e.g.*, assault, battery, trespass to land and chattels, conversion, and defamation.[605]

Determined to reestablish that which the Anglo-Saxons had enjoyed, Henry set about to bring the courts near the door of every person. After the Norman Conquest, each local farm villager continued to enjoy easy access to two courts: the Court Baron for freehold tenants and the Court Customary for villein (non-freehold) tenants.[606] Thus, the Court Baron empanelled juries of freeholders as peers; the Court Customary empanelled juries of villeins as peers. Further, in the royal courts, Henry offered justice consistent from shire to shire and hundred to hundred, all guided by a common precedent of case law recorded on the rolls and made available to all throughout England. Henry never invented the Jury, but instead, confirmed it as a matter of law and made its operation regular. By his insistence upon the continued use of the common-law Jury, he encouraged further use of courts as the heartbeat of government.

The Crown made it known that it backed the Jury. Henry issued writs commanding local sheriffs to empanel the Jury. In those days, the scope of the juryman's duties was wide, being sworn witnesses (those with personal knowledge of the case before them) as well as judges of the facts and application of the law. To avoid unnecessary delay and expense, however, courts allowed opposing litigants to agree to rely upon the decision of a jury *de circumstantibus* (a jury of bystanders). Indeed, as much as any other characteristic of common law and government, the common-law Jury and all that it demands and entails, distinguishes the common law from the civil and canon law. By his support of the Jury,

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[605] Yet today in some common-law countries, indictments for crimes end with the old charging phrase, "against the peace of the lord king."

[606] *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 15–16 n.8 (1962). Most manorial courts exercised jurisdiction over non-criminal matters without limit and jurisdiction over criminal matters, limited to minor offences. Thus, actions for debt, tort, and defamation were common in the manorial courts. No offense was so small that a party could not bring it before the Jury. Consider, for example, the finding of the manorial-court case Ralph Bolay v. Rohese Bindebere:

> It is found by inquest (the jury of tenants) that Rohese (Rose) Bindebere called Ralph Bolay thief, and he called her a whore. Therefore, both in mercy 3d (fined three pence each). And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohese, as has been found, therefore, it is considered that the said Ralph do recover from the said Rohese 12 d. for his taxed damages.

Id. at 16 n.8. One manorial court issued the following rule: "It is ordered that all women in the vill hold their tongues and not scold or defame anyone." *Id.*, *quoting* 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 383 (1925) (parentheticals in original).

Henry further established the common-law ideal that has endured: the king is not the source of the law.

To be sure, the English, lowborn and highborn, had accepted trial by jury as a matter of course. Still, from the Norman Conquest to the time of Henry II., due to the control of the common-law courts by the French-speaking Norman priests indoctrinated with canon-law principles, the Jury was losing influence. At bottom, the reason was straightforward: because the vast majority of the population spoke only Anglo-Saxon and knew nothing of the canon law, most in England felt estranged from the courts. Henry II. restored to the popular consciousness, however, the right of trial by jury as a special right of Englishmen and jury duty as a fellowship of Englishmen. Procedures even developed that allowed litigants sued in Rome's canon-law courts to remove their case, without motion, to a royal court, as parties do of right today in removing their cases from state courts to federal courts—if the federal court has jurisdiction.

By stressing the Anglo-Saxon spirit of due process, Henry II. enlarged the application of the common law. Henry's efforts to quick effect and gave lasting results: a present-day common lawyer transported into the English courts at the end of the life of Henry II. would feel largely at home. Resting upon the leading Anglo-Saxon principles, the courts of twelfth-century England molded into regular forms and processes the ancient principles of due process and law that we now enjoy: *e.g.*, the law shall never accuse any man of an offence that the law has never defined; the judge is an umpire that never prosecutes, allowing adjudication only upon such evidence as the parties choose to produce; witnesses must testify in public, on oath, and be subject to examination and cross-examination, never by the judge but by the litigants or their lawyers; in a jury trial, the jurors weigh the evidence and the testimonies of the witnesses, without meddling from the judge.[607]

These principles of common law are clearest when put in contrast to those practices of "the alternative system, which still dominates most of the world":[608]

> Under Roman law, and systems derived from it, a trial . . . in some countries even today, is an inquisition. The judge makes his own investigation into the civil wrong or the public crime, and such investigation is largely uncontrolled.

[607] *See* CHURCHILL, *supra* note 62, at 163.
[608] *Id.*

> The suspect can be interrogated in private. He must answer all questions put to him. His right to be represented by a legal advisor is restricted. The witnesses against him can testify in secret and in his absence. And only when these processes have been accomplished is the accusation or charge against him formulated or published. Thus often arises secret intimidation, enforced confessions, torture, and blackmailed pleas of guilty.[609]

Because of Henry's zeal, foresight, and ability to see the conflict that threatened the future of common-law freedoms, history calls Henry II. *father of the common law*. To be sure, Henry has earned praise, but the title misleads. Though Henry did much to establish and preserve the common law's first principles, he never authored them. Just as our founding fathers never invented a new form of government, but instead, strengthened common-law first principles by setting them in the solid framework of our written Constitution; Henry II. strengthened those principles by setting them in the solid framework of regular due process, accessible Jury verdicts, and court opinions, all duly recorded for ready access.[610] All agree, no man has left a deeper mark upon the forms of English law than has Henry II.

During the fourteenth century, John Wyclif[611] discerned the dangers of civil law to common-law freedoms. Upon Wyclif's advice, Parliament counteracted the increasing usurpation of Rome's civil law by barring three things: extradition of any Englishman to a foreign country or tribunal for inquisition without the consent of Parliament, any appeal to the Papal Curia (the pope's tribunal) for a matter within the power of English courts, and any Roman priest from practicing law or acting as a judge in the courts of England. Parliament saw Rome's priests as the conveyors of Rome's canon law and the priests' practice as attorneys and sitting as judges to be subtle attempts to secret civil law into England, claiming the cover of God's blessing.[612]

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[609] *Id.* at 164.

[610] Our Founders put to writing an improved application of those already-existing common-law ideals that their ancestors had practiced to varying degrees for centuries and handed down to them. In addition, they understood aright that the mental habits of the common law—accustomed ways of viewing law and government, viz., a worldview—of a critical mass of persons prevailed among Americans.

[611] See generally § 3.7.5 of this book (discussing the life of John Wyclif and his loyalty to the common law' case law as opposed the civil law's Code).

[612] Parliament intended to bar any citation to the decretals of the popes and emperors. Modern official citation of Roman Church law is to the *Decretals* of the Roman popes and to the civil-law Code *Codex Juris Canonici* of 1917 or its reissue of 1983. The fundamental

The thirteenth-century judge Henry de Bracton[613] was a kindred spirit to Steven Langton, author of Magna Carta and Archbishop of Canterbury. De Bracton declared that the king is under the common law; a significant statement because de Bracton, like Langton, was a churchman, holding a civil-law education from Oxford University. Thus, de Bracton understood both the civil-law and the common-law traditions. Both men withstood the disfavor of Rome for insisting that the kings and Englishmen be subject to the common law and not to the imperial pontiff. Rome, on the other hand, knew that as long as England was subject to the king and not to the common law, Rome's control of that king meant control of England.[614] In the face of this threat, de Bracton reminded his countrymen of the common law's biblical ideals:

> The King himself . . . ought . . . to be under the law, because the law made the King . . . That . . . [the King] ought to be under the law is clearly shown by the example of Jesus Christ . . . [who] used, not force of His power, but the counsel of His justice . . . "that He might redeem those who were under the Law."[615]

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and particular substance of these sources has remained constant through the centuries. See generally §§ 2.8.3, 2.14 of this book (setting forth the symbiotic relationship between Justinian's *Corpus Juris Civilis* and the Vatican's *Codex Juris Canonici* and their common goal: a single monolithic state).

[613] See generally §§ 3.7.2–3.7.3, 3.7.5–3.7.10 of this book (discussing the lives and works of Langton, de Bracton, Wyclif, Fortescue, and Coke, including discussion of their loyalty to the common law as opposed to the civil law).

[614] After King John—with gritted teeth—signed Magna Carta, he felt the scorn of Europe's imperial princes. Humiliated, he appealed to the pope, hoping in the power of this imperial bishop to reverse what he had done under the duress of force's threat. For evidence to persuade the pope, John sent a copy of Magna Carta; upon reading the liberties in it, the pope's visage fell; his voice erupted in fury: "Would [the barons] of England force [King John] to transfer the dominions of the Roman Church to others? By Saint Peter," swore the pope, "this injury must not pass unpunished." After thrashing out the matter with his cardinals, the pope damned Magna Carta and its author Steven Langton forever and dispatched a papal bull, announcing a sentence of anathema to all active in bringing about Magna Carta.

[615] HENRY DE BRACTON, DE LEGIBUS ER CONSUETUDINIBUS ANGLIAE 39 (Sir Travers Twiss ed., 1878). In the common-law tradition, the courts—having foremost the influence of persuasion, not force—are to exercise judgment wholly independent from the other offices (branches) of government. See generally *Hosea* 5:12–14, where God teaches by analogy: He prefers to nudge His people in the right direction with the fluttering bump of a moth in flight than to become fierce toward them as is a young lion on the hunt. In the common-law tradition, the primary tool of the courts is to be the strength of their arguments based on the evidence, not the force of their bailiffs and marshals. For example, Scripture teaches that God does not "counsel" (*βολνομαι: boluomai*) any person to be destroyed. *See* 2 *Peter* 3:9: *βολνομαι* (*boluomai*) denotes God's advice and counsel, not His determined will (*θελω: thelō*), to be achieved by force.

Further, de Bracton affirms three common-law fundamentals: *first*, the king is under the law, as are all men; *second*, the Creator, not the king, is the fountain of law; *third*, the common-law tradition, following the example of God's Word, distinguishes between *power*, which is raw force, and *counsel*, which is persuasion. For example, a common-law court of record traditionally delivers its opinion accompanied by reasons fashioned to persuade. On the other hand, a civil-law magistrate delivers decrees or—as a civil-law magistrate's decree was known in the universal language of the Roman Empire at its zenith—a *dogma*: that which the state sets forth to be believed and obeyed, without providing persuasion by way of reasons.[616]

During the fifteenth century, practice in England's royal courts was open only to lawyers having completed eight years of common law training in the Inns of Court. This requirement left most common lawyers unwilling to spend another five years studying to earn a civil-law degree. Nevertheless, some common lawyers obtained training in both traditions. As had Henry de Bracton in the thirteenth century, in the eighteenth century both William Blackstone and William Murray,[617] though thoroughly familiar with both the civil-law and the common-law, remained unwavering proponents of the common law.

Intending to guard the common-law courts from the influences of Roman civil law, English judges—especially after Henry II.—held to an unwritten rule of honor to never seek advice of the civil-law doctors of

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Moreover, God's works through us are never by our might or power but by His Spirit. *See Zachariah* 4:6: "Not by brains and not by brawn, BUT [כי אם (*key 'em*): the strongest Hebrew disjunctive, "in total contrast"] by my Spirit, says the LORD of armies." The Hebrew terms here not only denounce man's use of raw physical human power independent of God's directive, but also denounce man's reliance upon human reason unfounded upon the premise of divine revelation: God's Word written and the truth found in nature consonant with that Word. All power belongs to God: "[His] is the . . . power . . . ." *Matthew* 6:13. Thus, God is unopposed to the right use of power, but He opposes any man using power contrary to His clear directives.

[616] See generally § 5.1.7 of this book (discussing the origin and use of the term *dogma*, a civil-law technical term, in the Greek-speaking civil-law world).

[617] That Murray (Lord Mansfield) learned Roman law is certain, but where he learned it is uncertain:

> William Murray had the natural affinity of the Scot for France and the French. Campbell says that he attended lectures on Justinian. This is possible as he certainly had a good knowledge of Roman Law and it is likely that he acquired this knowledge before reading for the bar in London.

HEWARD, *supra* note 386, at 10.

Oxford or Cambridge.[618] Indeed, history has no record of common-law judges pondering any need to fall into lockstep with the rest of the civilized (civil-law or *civilian*) world, as is heard concerning American judges nowadays.[619] The civil lawyer and judge, by tradition and training, tend to treat statutes as though from the gods. Their tradition demands that the judge, in coming to his decision of how to apply the law in question, never look beyond the language of the statute. To him, the Code is supreme, which is to say that legislator is supreme. Adherence to the Code is, by custom, blind. The training and culture of the civil law still breeds this fundamental into the student civilian.

Because the priests' civil-law culture forbade trial by jury, the priests appointed to the benches of the common-law courts loathed the Jury. Consequently, after the reign of Henry II., the justices of the common-law courts appointed only Serjeants-at-Law practicing in the common-law courts, and never Roman priests, as commissioners and judges. Even yet today, because those untrained in law are empanelled as jurors with authority to determine the facts of a case, lawyers in civil-law systems—called civil lawyers or civilians—stand in scorn of common-law countries.

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[618] The Roman Church established the continental universities of Europe to reinforce the civil-law prerogatives of the pope and his priesthood. When Roger Vacarius, a graduate of Bologna's University of civil law, began civil-law lectures at Oxford, England's King Steven (reigned 1135–1154) silenced him. Theobald, a Norman abbot "extremely addicted" to the study of Justinian's Code, had placed Vacarius at Oxford. *See* 1 BLACKSTONE, *supra* note 12, at 18.

[619] Because England's judges were discerning in this matter, Americans now enjoy the advantages that the common law has brought to them. American judges ought likewise to refrain and recoil from the allure of seeking answers to America's peculiar legal questions in the decrees of international courts, whose principles are opposed to the liberty-sustaining ideals of the common law. Nowadays, international court jurists are devotees of civil-law imperialism:

> I once attended an international conference of lawyers and judges which several members of the European Court attended. Facing a union made up of widely different nations and culture, *they were especially interested in how the American Supreme Court had largely obliterated the independent authority of the state governments* . . . Imperialistic fervor shone from their eyes. There seems no doubt that this court will behave as all Western-style courts do. *Jurists are drawn from and respond to the intellectual class.* They have in common the belief that their own views are superior, more civilized and just, than those of the public or those they elect to represent them. This assumption of judicial intellectual and moral superiority is not likely to be replaced by judicial modesty, which was the virtue assumed in judges at the outset of the American republic, any time in the foreseeable future.

MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION AND INCOMPETENCE ON THE BENCH vii (1998) (emphasis added), *quoting* Judge Robert Bork.

They are further indignant that the individual juror will *take power* to sit in judgment over the law and declare, without fear of lawful reprisal, a law unlawful as applied.[620] At the ratification of the Constitution, such was the practice:

> It is left . . . to the juries, if they think the permanent judges are under any bias whatever in any cause, to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges; and by the exercise of this power they have been the firmest bulwarks of English liberty.[621]

During the twelfth and thirteenth centuries, the rivalry between the papacy and the English Crown had waxed keen; English kings forbade the teaching of civil law, whether as Justinian's Code or, in its ecclesiastic form as canon law. During the fourteenth century, however, John Wyclif went a step further. Realizing that removal of civil law from Oxford would create a dark and dangerous vacuum, and that light drives darkness out, he called for the teaching of common law at Oxford.

For almost four centuries, Wyclif's idea went unheeded; Oxford, instead, forbade the teaching of common law. Then in 1758, William Blackstone delivered his Oxford lectures on the common law.[622] Even then, Blackstone was apologetic about doing so because the university's scholastic-minded faculty looked down their noses at the common law and common lawyers as inferior. Moreover, teaching of the common law fostered ideals contrary to the scholastics' goal: superiority of human reason, as Justinian's Code and canon law command it, and as scholasticism teaches it. To the Oxford schoolman, the teaching of common law was little more than a common trade-school course, an attitude yet pervasive among civilians, i.e., civil-law attorneys.[623]

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[620] Modern common-law courts instruct the Jury of its authority as sole judges of the facts and of its power as judges of the law's application. The common-law Jury has also exercised its prerogative to judge the law, where a judge has shown his judicial bias by his participation in the prosecution of the accused. See generally §§ 4.3–4.3.7 of this book (discussing the traditional common-law Jury's authority and power, purpose and duty).

[621] Thomas Jefferson, by explicit reference to *permanent judges* in this context, refers implicitly to jurors as *temporary judges*. In pre-Norman England and in the text of Magna Carta, only members of the *moot* (the Jury) were judges, and were so-called.

[622] Blackstone, from his lectures of 1758 at Oxford, produced his famous *Commentaries*.

[623] See generally § 5.2 of this book (discussing the reasons for the civil-law tradition's wide appeal and man's attraction to its boast of pure reason abstracted from the throes of life's struggles).

§ 3.7.1
Common Law:
The Phrase's Origin & Use

Only after the time of Henry II. did the phrase *common law* come to denote the English tradition of law and government. The English phrase *common law* answers to the Latin *jus commune*: signifying the dual system of Roman canon and civil law taught in the European universities and universally applied in Roman control of churches and nations.

Early on, the Roman world called England's law *legas barbarorum* (Latin, "laws of the barbarians"), then later *leges Edwardi Confessoris* (Latin, "Laws of Edward the Confessor"). Early documents of the Laws of Edward the Confessor are extant, but of dubious accuracy.[624] Later, Sir John Fortescue called England's law *legum Angliae* (laws of the Angels); later yet, Englishmen called their tradition "the common law." The great distinction in the mind of the Roman was that his laws were *civil* (of the city), therefore he was a civilian, and thus, civilized; the law of the English was *terrae* (of the land) and barbarous.

Henry II. labored to further make stable the common law. Following his reign—after 23 September 1189—common lawyers began to recognize and stress that the common law was to England what Rome claimed the civil law was to the imperial church and state. In 1075, Rome had claimed her power and law extended without limit to all men in all nations and included the power to tax and raise armies. English common lawyers defied these outlandish claims, countering that though Rome claimed her *jus commune* governed the rest of the known world, it was inapplicable in England because England had her own *jus commune*—, which, in English, they called "the common law."

After the twelfth century, Henry II. set up a system of recorded court opinions, enabling more precise guidance from precedent than courts had been able to get by relying on memory, i.e., custom as precedent. While local courts continued to refine the applications of common-law principles to fit specific cases, the grand principles of the common law, recorded by the case opinions of the courts, began to give the English at each locality a sense that they held their tradition of law and government in common with the rest of their country. Consequently, the English evermore referred to the laws of the England as "the common law."

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[624] *See* POLLOCK & MAITLAND, *supra* note 82, at 99, 103.

A chief strength of the common law is its zeal for its principles, which includes resistance against civil law as a foreign eroder of freedoms. In drafting Magna Carta, Steven Langton used the phrase *lex terrae* ("law of the land"; Norman French, *ley de terre*) to denote the common law of England as contrasted with the civil law of Rome. In addition, *lex terrae* belies the influence of real property law in the common law's formative years in England, thereby contrasting the common law's roots in private property rights with the civil law's roots in urban, administrative law.

Earlier, the phrase *lex terrae* denoted not the common law in general, but the common law's stress of due process. Later, the English translation of *lex terrae*, "the supreme Law of the Land,"[625] found its way into our Constitution, indicating the common-law soul of the Constitution—which, by the terms of Article VI, binds every judge in America. "The Constitution's phrase, 'due process of law,' was without doubt intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta*."[626]

When pondering the phrase "common law," one must remain careful to never allow civil-law scholars to obscure the distinct character of English common law with civil-law concepts. For example, German legal scholars speak of common law with the phrase *gemeines recht* (literal English: common law); though their term is comparable, their concept is wholly unlike English and American common law. *Gemeines recht* signifies a people's observance of civil law that has arisen spontaneously from the influence of neighboring societies that follow an enacted civil-law Code.[627]

Through time, common lawyers have used the phrase *common law* to recognize its unchanging first principles among common-law countries and other local variations, and to distinguish the common-law tradition from the civil and canon law codes and other legislation. The following four understandings of the phrase *common law* stand out among the best known and accepted:

> (1) The "law in force in all of the Kingdom of England, as distinguished from local customary law peculiar to a limited area, such as the customs of Kent" during the medieval period;
> (2) "[J]udicial precedents—as distinguished from statutes enacted by Parliament or some other legislature";

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[625] U.S. CONST. art. VI, cls. 1, 2 (capitals in original).

[626] Murray's Lessee v. Hoboken & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (Curtis, J.). *See* MAGNA CARTA ch. 45.

[627] *See* LON L. FULLER, ANATOMY OF THE LAW 133 (1968).

(3) "The law applied by the former courts of King's Bench, Common pleas and Exchequer, as distinguished from the canon law applied by the ecclesiastical courts and the rules of equity administered by the High Court of Chancery"; and

(4) "The law of those areas which have systems of private law derived from and more or less resembling the law in force in the Kingdom of England when it merged in the Kingdom of Great Britain (1 May 1707). Such areas would include "the British Isles (except Scotland), the United States of America (except the State of Louisiana and the Commonwealth of Puerto Rico), Canada (except the Province of Quebec), Australia, New Zealand, the Republic of Liberia, and some of the present ad former British colonies and possessions in Africa, the West Indies and elsewhere."[628]

§ 3.7.2
Steven Langton:
Magna Carta –*vs*– Canon Law

[In] Magna Carta . . . both sovereign and subject were in practice bound by the Common Law, and the liberties of Englishmen rested not on any enactment of the State, but on immemorial slow-growing custom declared by juries of free men who gave their verdicts case by case in open court.[629]

Before penning the Declaration of Independence of 1776—the first of the American charters of freedom that included all the Colonies—, the Founders knew the precedent for asserting their liberties to the English Parliament and King George III. Five hundred and sixty-one years earlier, on 15 June 1215, on a low island in the River Thames called Runnymede Plain, close to where Windsor Castle now stands, the barons assembled to confront King John with Magna Carta. John, strapped for money and desperate, signed it.[630] Leading up to John's signing, Steven Langton had set himself to restrain King John's lawlessness and to

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[628] W.F. FRATCHER, 6 INTL. ENCYCLOPEDIA OF COMP. LAW 2–3 (F.H. LAWSON ED., 1973), *quoted in* CHARLES E. ROUNDS JR. AND CHARLES E. ROUNDS III, LORING A TRUSTEE'S HANDBOOK 9 (2008).

[629] CHURCHILL, *supra* note 62, at 164.

[630] The foregoing sentences *excised and edited from* Janel McCarty, *National Archives and Records Administration* (visited 9 June 2006) <www.magnacarta.com>.

mediate between John and the aggrieved barons. Langton's labors resulted in John's signing of Magna Carta. King John, however, now disgruntled, appealed to Rome, convincing the pope that Langton had forced him to sign the Charter under duress. The pope, understanding the threat of Magna Carta to papal power, decreed King John absolved from all obligations under Magna Carta and suspended Langton from his archiepiscopal office.

Born in England of a humble family in 1155 or 1156 and educated in Paris, Steven Langton earned a reputation as an able Old Testament commentator. He authored many commentaries on the Bible; history credits him with our present Bible chapter divisions, besides many other theological, historical, and poetical works. As Archbishop, Langton used his influence to establish peace and order in his country and in the English Church: at Osney, in 1222, he drafted the *Constitutions of Langton* that leveled the way for the English Reformation. Langton died on 9 July 1228.[631]

Upon his appointment as Archbishop, Stephen Langton became the spiritual leader of England in title and fact, and the leader of England's government in fact, though not in title. Langton—as did Wyclif after him—saw that the principles and processes of the common law enabled the practice of scriptural precepts in law and government. At Westminster, on 25 August 1213, in the presence of the highest churchmen and the barons, Langton proposed a mutual security agreement among those present for the preservation of English laws—the precursor of Magna Carta by two years. Later, in council at St. Albans, he produced a common-law document, the *Laws of Henry I*, for King John to ratify, but John ignored Langton's demand.

Among Langton's attempts to enliven the common law of England, is his initiation and drafting of Magna Carta. Saher de Quincey, Roger Bigod, William Marshall, and Chief Justiciar of England Hubert de Burgh contributed to Magna Carta's drafting, mediation, and signing. However, of all the men involved, Steven Langton was the best learned (i.e., his conscience was best informed) and Magna Carta's greatest influence.

Langton worked non-stop to affirm the ancient fundamentals of English law and government. By staying independent and objective, he opposed King John's attempt to force the barons and their retainers to invade Poitou in France; and kept the pope's legate, Nicholas of Tusculum, from filling vacancies in abbeys and bishoprics with foreign papal puppets. Langton's independence enabled him to act as daysman at

[631] *See* G.M. BEVAN, PORTRAITS OF THE ARCHBISHOPS OF CANTERBURY (1908).

Runnymede between the barons and King John, mediating in the heat of their conflict.

Because Magna Carta's common-law ideals militated against pope Innocent's civil-law prerogatives, Innocent opposed Langton and sided with King John; because John had submitted himself to Innocent two years before, he was now the pope's liegeman. Thus, both the pope and King John now joined in defense of the infallibility of Rome's imperial power. The imperial pope, froward and brazen, commanded Langton to publicly denounce the barons and all other "disturbers, who had wrested from King John his subscription to Magna Carta." Langton, steadfast, refused; the pope, wrathful, excommunicated[632] Langton and all the barons. To Langton, however, excommunication was a small matter. His disagreement with the papal theory of absolution in both temporal and spiritual affairs, however, he knew rooted deep in Scripture, and thus, was a great matter. Besides, Innocent soon died—the same year as King John, 1216.

Langton devoted the final eight years of his life to upholding peace in England by defending the common-law tradition and keeping the English Church independent from Rome.[633] The famous *Constitutions of Langton* are the Magna Carta of the Church in England that paved the way, 300 years later, for England's final break with Rome. Historians regard Stephen Langton as the most original commentator of the Scriptures, next to Bede. Langton also wrote a history of the life of Richard I. and composed poetry, though now lost. Langton was learned, humble in the realization that the search for more wisdom, during this life on earth, must never end. As Wyclif, Langton held that no son of Adam has the right of domination over any other. Langton, together with two other men of kindred spirit, William Marshall and Hubert de Burgh, were the three great men at Runnymede.[634]

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[632] *Excommunicate*: canon-law Latin word, meaning to throw a person out of the fellowship and blessings of the city-life, and then to curse him. The words *communion*, *excommunicate*, *community*, and the concepts they bear, sprang from Babylon. The Greeks then bedecked these ideals with Greek terms, identifying them with the Greek city-state. Rome received these by way of Pergamos; the Roman Church replaced the canon-law Greek terms with Latin. To the civilian, to be part of the *community* is to be a citizen of the city (*πολις: polis*) in good standing and eligible to share in the rites of religion, called *communion*, all of which form the components of *politics* the affairs of the city.

[633] *See* MAGNA CARTA chs. 1, 63. Chapters 1 and 63 are the first and last of Magna Carta; both chapters read, "[T]he English Church shall be free . . . ." Thus, Magna Carta opens and closes, pledging freedom for the English Church."

[634] The foregoing paragraph *excerpted and edited from* <www.magnacarta.com> (visited 22 Apr. 2006). Though Steven Langton, William Marshall, and Hubert de Burgh were indispensable to the success at Runnymeade, King John, in the providence of the Almighty, though unwilling, signed the Charter. Then John, by appealing to Rome for help

Steven Langton initiated, drafted, and brokered Magna Carta; his name heads the counselors on the Great Charter. Straightway, after King John's death in October 1216, John's successor Henry III. reissued Magna Carta in his name. In 1217, another reissue came; in 1225, Langton obtained the final revision from Henry III.; and in 1297, Edward I. confirmed this final revision.

§ 3.7.3
Henry de Bracton:
Justice –*vs*– Jurisprudence

De Bracton was a judge of the Court of the King's Bench, who wrote (it is believed) under the name *Britton*, which also became the title of the earliest summary of the common law of England after the Norman invasion. The author of *Britton* bore the name Britton, although sometimes spelt different. Written in Law French, *Britton* was a popular and practical book for lawyers practicing in the royal courts.

Though historians dispute Britton's identity, they agree that he was a famous common lawyer and churchman living in the days of Edward I. (1272–1307). He apparently descended from the family of Breton, which flourished for several generations at Wickingham in Norfolk County. According to Sir William Dugdale, Britton was first of the justices of the Common Bench during the last years of Henry III. Later, he became a justice of the Court of the King's Bench. He had been a justice in the Eyre, as well as Doctor of Laws and, in 1275, became bishop of Hereford.[635] Lord Coke adds that the work *Britton* was the only compendium of the law of England as it stood at the beginning of the reign of Edward I.

Tradition, on the other hand, attributes the authorship of *Britton* to John le Breton, bishop of Hereford. This, however, is troublesome because le Breton died in 1275, but *Britton* alludes to statutes passed in 1290. Due to this discrepancy, Balaens puts the man Britton in his prime in 1350, having completed the law book *Britton* in 1342. Though this demands the author of *Britton* to be Henry de Bracton, lower criticism of the work allows evidence otherwise. The Wingate edition of *Britton* (1640) concludes that the evidence leaves each to his peculiar fancy.[636]

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to undo Magna Carta, set the stage and paved the way for John Wyclif and the Reformation in England, which later drove British settlers to North America.

[635] Florigus states that until Edward I., it was possible to be a priest and a judge at the same time; Britton may have been both.

[636] *But see* FORTESCUE, *supra* note 59, at xxi, xxiii, xxviii, xl, xlv.

History best remembers de Bracton for his *De Legibus er Consuetudinibus*,[637] which uses parts of Roman civil law. For the Romans, however, "his book would have been impossible . . . the main matter of the treatise is English law laboriously collected out of the plea rolls of the King's court . . . [O]f any desire to Romanize the law we must absolutely acquit him."[638] In the case of *Regina v. Dudley and Stephens*, Lord Coleridge cites de Bracton's passage on necessary homicide, commenting, "It was at one time the fashion to discredit Bracton because he was supposed to mingle too much of the canonist [the Roman Church's civil-law attorney] and civilian [the state's civil-law attorney] with the common lawyer. There is now no such feeling."[639]

Notwithstanding those things unsure about de Bracton, other things are sure. As did William Blackstone, de Bracton knew well Roman civil law, having studied under Azo the *civilian* (professor of Roman civil law) and Tancred the *canonist* (professor of Roman ecclesiastic law), at the preeminent school for civil lawyers, the University at Bologna.[640] De Bracton also knew well his native common law; as did Blackstone, de Bracton freely chose the common law, adjudging its foundations best. De Bracton recognized in the Anglo-Saxons' custom an unwillingness to judge disputes in mere anticipation of conflict.

For example, Henry de Bracton distinguished *jurisprudence*[641] from *justice*. Jurisprudence, said de Bracton, is a provision of legal rights and

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[637] *See* HENRY DE BRACTON, DE LEGIBUS ER CONSUETUDINIBUS ANGLIAE (Sir Travers Twiss ed., 1878): put into English, *"Concerning the Laws and Customs of the Angels."*

[638] 1 POLLOCK & MAITLAND, *supra* note 82, at 206–09.

[639] *See* Regina v. Dudley and Stephens, 14 Eng. Rep. 273 (Q.B.D. 1884). But see SIR HENRY SUMNER MAINE, ANCIENT LAW 67–68 (photo. reprint 1986) (1861), where Maine accuses Bracton of plagiarisms of Roman law:

> That an English writer of the time of Henry the III. should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris . . . will always be among the most hopeless enigmas in the history of jurisprudence.

Id.

[640] See generally §§ 2.8.2–2.8.3 of this book (discussing the common essence of canon law and civil law). The terms *canonist* and *civilian* both denote the Roman civil-law attorney. The academic degree *Juris Utri que Doctor* (J.U.D., "Doctor of Both Laws") connotes both the civil law and the canon law. Some universities in the civil-law world still grant the J.U.D degree.

[641] Latin, *Iuris prudential*: a providence or coming of law before a legal conflict arises. Prudence is commendable. Bracton believed that the surest method to understand future human behavior is to learn human behavior of the past. Langton's day "was the great time when there were great judgments whose judgments were worthy of record." Bracton looked to these court findings. "[O]f his own contemporaries . . . he [Bracton] thought but meanly.

remedies in anticipation of a possible or speculative behavior or legal conflict; justice, by contrast, attributes to each party now clashing before the court their actual due. According to de Bracton's definition, jurisprudence's only choice is to act in ignorance.[642] Thus, jurisprudence is a speculative science so-called:[643] a human attempt to lay down rules for fortuitous behavior and legal conflicts, the facts and circumstances of which man is ignorant because the events contemplated have neither occurred, nor possibly ever will occur. Defined thus, legislation is jurisprudence because the legislator, in ignorance of the future and in fear of it, attempts to delimit and enjoin all possible behavior touching upon that particular fear. Jurisprudence responds to fear of the future; justice responds to facts.[644] By contrast, common-law court findings are

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It was to the examination of old judgments, as he himself expressly says, that he had given his mind." 1 FREDERIC WILLIAM MAITLAND, *The Deacon and The Jewess; or, Apostasy at Common Law*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 392 (1911) (emphasis added).

[642] *Jurisprudence* means judgments in ignorance; even though prudent, it speculates about the unknown future. The term "ignorance" stems from the Greek *αγνωσις* (*agknowsis*): joining the alpha privative *α–* (without) and *γνωσις* (experiential knowledge). In the Latin it became *ignotus* and transliterated into English with "agnostic." Ignorance understood in its etymology puts the fundamental difference between the common-law and civil-law traditions' conceptions of law. Civil law is the pronouncement of the state's will by legislation made without the added knowledge of experience: i.e., purely according to reason and without benefit of precedent. Common law, on the other hand, rests upon experience through case precedent.

[643] *See* 1 *Timothy* 6:20. Much of that which men call science (*γνωσις: gnosis*) is falsely so-called, being rather, reason divorced from experience, i.e., conjectural and hypothetical. By contrast, true science is empirical: reason based on experience—whether one's own or another's—and evidence of experiences. Ancient and recent civil-law theories, such as German legal science, call themselves science, but remain committed to speculation of the unknown future. Hypothetical examples abound in legal literature influenced by civil law. By contrast, the *gnosis* or knowledge is one's knowledge known through experience as opposed to *οιδα* (*oida*), which is abstract conjecture: mediate or second hand knowledge, such as hearsay.

The necessity of Christianity's new birth is first hand knowledge: i.e., personal experience. "I write these things to you," says John, "that you may *know* [*γινωσκετε: ginoskete*] . . . ." 1 *John* 1:4. Twenty-four more times throughout the book's five chapters, John the apostle repeats this purpose in writing 1 *John*. The effectiveness of the Christian life emerges from the confidence engendered by experience, not speculation. So also, the effectiveness of the common-law tradition emerges from the sure-footed confidence of experience, not the slippery surface of academic jurisprudence.

[644] Godless fear is to believe lies; godly faith is to believe facts. *See, e.g, Job* 3:25, *Isaiah* 66:4. See also generally the prophet *Habbakuk*, wherein Habbakuk, in four short chapters, begins in fear of the future, loses all confidence, and teeters on the edge of emotional breakdown. He then recites the facts, on evidence of the past, becomes confident of the future, and regains his emotional stability. Legislation is, at bottom, jurisprudence, that is, reactionary and revolutionary instead of responsive, and put in motion by two methods: mongering of fear or of moral outrage. Fear mongering is always wrong; mongering of moral outrage can be right, but when used to promote legislation it is most often abused using misrepresentation, deceit, and downright lies. In any case, both methods are

not speculation (jurisprudence) but are *justice*, resting upon real experiences used to weigh the facts of events that have already occurred. Therefore, de Bracton calls justice a *virtue*[645] because it responds from an informed perspective: in specific retrospect to facts and actual wrongs done.[646]

§ 3.7.4
Development of Parliament

[Men] thought of the law rather as a fixed standard . . . The Great Charter [Magna Carta] therefore is not in our sense of the word a legislative or constitutional instrument. It is an agreed statement of what the law is . . . its importance lay not in the details but in the broad affirmation of the principle that there is a law to which the Crown itself is subject . . . In other words, personal government, with all its latent possibilities of oppression and caprice, is not to be endured.[647]

Unlike legislative bodies in civil-law countries, the English Parliament has never been foremost for decreeing the state's imperial will, but arose and remains an arrangement of parleying between and among the king and the British people, aimed at discovering and agreeing upon what the law is. Though history does not recognize Magna Carta as a parliamentary event, the parleying between King John and the barons out of which Magna Carta came is in keeping with the Anglo-Saxon customs and the ideals behind Parliament.

The first English Parliament began as the unwitting reconstitution of the Anglo-Saxons' and Danes' Witan (elders) and moot (assemblies).[648]

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inseparable from the majority principle and therefore dangersome to the God-given dignity of individual rights. Common law rests on the surefootedness of facts; civil law rests on the fear of speculation.

[645] De Bracton uses the Latin *virtus*: manly strength by moral excellence. *See* CASSELL'S NEW LATIN DICTIONARY 645 (1st ed. 1960)

[646] In considering their decrees, civil-law tribunals focus on the general anticipations of legislation (the Civil Code); but a common-law court discerns justice in retrospect, focusing on the peculiar facts and circumstances of the parties before the court. Common-law courts will hear only real cases and controversies (i.e., the injured party alleges that where a substantial wrong has been done resulting in real measurable damages) that have matured to *ripeness* (i.e., the disputed facts between the parties have matured and grown sharp enough to yield truth under the blows of a trial). The common-law courts will not hear cases that have developed beyond ripeness and that time has thus made *moot* (i.e., the legal question remains, but time has rendered the parties' disagreements mere academic debate: any resolution of the dispute between the parties having now become meaningless).

[647] CHURCHILL, *supra* note 62, at xvi.

[648] The Teutonic peoples all had alike assemblies comparable to the Witan. Predating the English Parliament, the Tynwald of the Isle of Man claims to be the oldest continuous legislative assembly in the world. Founded in A.D. 979 by Norwegian settlers, the Tynwald

Parliament has always strengthened the common-law tradition's limited political impulse, which Fortescue held a characteristic distinguishing between the common law and the civil law. By the middle of the thirteenth century, the second fruits of the work of Henry II. had appeared: the courts were dependent upon the local help of jurors. As the commoners' confidence that justice was available in the courts grew strong, their judicial activity increased.

Knights and barons were necessary for summoning jurors and for court administration. From freeholders to villeins, knights, barons, and commoners—depending upon which of these groups the defendant belonged to—served as jurors. Thus, all three groups learned alike the processes, principles, and responsibilities of the common law. Consequently, the common-law ideals became activities shared by all classes, in three respects: *first*, a common willingness to take part in the courts; *second*, a common awareness that individual jurymen—good and true, whether highborn and lowborn—were the necessary soul of freedom under law, and therefore, the standard they all must pursue; *third*, a common confidence in the common-law principles of due process. In the eyes of all three groups, the common law became their law, shared in common for their individual protection. Thus, the English welded into a fellowship of which they alike were willing to defend against foreign notions.

Moreover, the fellowship of confidence and loyalty that grew out of every man's participation in the judicial function provided the knowledge and confidence necessary to form Parliament in its proper role.[649] By 1327, during reign of Edward III., the Crown's need for money to fulfill its duties was possible only by summoning Parliament and obtaining its consent. In addition, the original function of the House of Commons as representatives of the shires and boroughs to petition for redress of

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has always consisted of 24 members and still meets out of doors. As were the folk law councils of the Anglo-Saxons, the early Tynwald's function was judicial. Akin to the Jury in private matters, from time to time the Lord of Mann summoned the Tynwald to request advice as to the law.

The Løtinget assembly of the self-governing Danish Faroese Islands claims its beginnings about 150 years before the Tynwald. The legislature of San Marino, an enclave country in Italy, claims to be older yet, dating from A.D. 301. San Marino's legislature, however, is Roman in origin and operation; the Tynwald and Løtinget are present pictures of the ancient folk law.

[649] See generally *Preface* of this book (discussing the priority, centrality, and intelligent participation in courts necessary to enjoy the liberties of common-law government).

grievances[650] had developed into a formal process, making Parliament's legislation wholly unlike legislation in the civil law tradition.

The Commons appointed a clerk to draft its petitions to the Crown, in a form easily made into legislation, or if desired, to draft rejoinders to the Crown's replies to their petitions. By parleying with the Crown, *Parliament* lived up to its name, which also spells the difference between legislation in the common-law tradition and the civil-law tradition: the Crown is a component of Parliament because the Crown parleys with Parliament. By the end of the reign of Edward III. (1377), the role of Speaker of the House had emerged[651]and Parliament had formed into a regulator on the Crown's attempts to legislate.

Unlike legislatures in civil-law countries, Parliament never arose out of implementation of political theory, but out of sharpened strife between Henry III. and three groups: the barons, the bishops, and the rising middle class. Robert Grosseteste—scientist, former Master at Oxford, appointed Bishop of Lincoln in 1235, and harbinger of John Wyclif—had arisen to champion the English Bishops in their fight against the appointments of 300 Italian priests to vacant English positions. By 1248, Henry III. was smarting from the Barons' forming of their Great Council to choose Henry's ministers and to collect[652] and allot his revenues (the power of the purse). In his attempt to use force against the Barons, Henry fell prey to the attractions of civil-law doctrines. "Servants," said Henry, "do not judge their master, vassals do not judge their prince or bind him by their conditions. They should put themselves at his disposal and be submissive to his *will*."[653]

Grosseteste's friend, Simon de Montfort, first summoned a Parliament in January of 1265 to give a give legality to his actions and, thereby, to provide a strong popular element in support of his struggle against Henry III. As the men at Runnymede, by seeking their own

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[650] *See* U.S. CONST. amend. I (recognizing the fundamental right of petition for redress of grievances, both individually and collectively). The courts are to recognize the individual constitutional right of petition—as also all other common-law rights—in light of freedom of association, when applicable.

[651] *See* CHURCHILL, *supra* note 62, at 262–63.

[652] The Framers of the Constitution, observing from history the danger of allowing the executive power to collect taxes, gave the collection power to Congress: "Congress shall have the Power To lay and *collect* Taxes, . . . to pay the debts . . . of the United States." U.S. CONST. § 8, cl. 1 (emphasis added; capital letters in original). Congress, however, has ignored its duty, allowing the executive to collect taxes. By taking up its duty of tax collection under this provision, Congress will take from the executive and place this power in the hands of Congress, thereby halting manipulation and spending not authorized by Congress. In short, the Constitution gives to Congress the power to lay taxes, collect taxes, and pay the debts of the United States.

[653] *Quoted in* CHURCHILL, *supra* note 62, at 198 (emphasis added).

interest thereby enlivened the ancient common-law standards, the fleeting political awareness intended by Simon de Montfort's summoning of the first Parliament relit a fire that remains unquenched. In a word, both the men at Runnymead and Simon de Montfort unwittingly served the interest of progeny: the natural human desire to have a hand in limiting the power of government by freely associating, agreeing, and acting in fulfillment of agreements. Early Parliament comprised influential men of England, but not all were of the nobility: in addition to earls, barons, abbots and other priests, merchants also took part. When the king needed tax revenue, he explained these needs to Parliament assembled; by this, he often persuaded them to consent to a tax levy. Of these men, some paid taxes directly to the Crown, while others paid taxes to these men, who, in turn, were to convey taxes to the Crown for use in the common defense of the country.

Thus, tax liability, then as now, rolled downhill. Producers of raw materials, and workmen that added worth to raw materials—farmers, fishermen, miners, artisans, and laborers—, bore the ultimate burden of taxation. Early members of Parliament, however, were those toward the top of the economic hill, able to pass their tax liability down to the producers and laborers. In a sense, those that paid taxes direct to the Crown collected taxes for the Crown without being paid for their trouble, but never bore the direct burden of producing the wealth that provided tax revenues. When government, therefore, hiked taxes, taxpayers at all levels—from those immediate to the Crown, down to those immediate to the actual producers of wealth—kept their income constant by passing tax increases down the economic hill to others. By 1275, Parliament exercised authority over taxation; by 1294, due to Parliament's power over taxation, Parliament demanded that Edward I. obtain its consent before going to war against the French.

Early Parliament, therefore, formed a buffer for the king against any frustration of the wealth-producing class, but failed to satisfy these commoners' lack of participation in the processes of law and government. Therefore, in order to gain political support from those bearing the direct bulk of the tax burden—i.e., those unable to pass it down—the idea arose to establish a House of Commons that represented the commoners upon whom the tax burden finally, and unavoidably,[654] fell. By design,

[654] The *unavoidability* of a tax places it in the category of direct taxes and distinguishes it from an indirect tax. This distinction between a direct and an indirect tax is necessary to an understanding of the Constitution's plan of congressional representation, Congress's power to tax, and limitations on how government may apportion taxes. *See* U.S. CONST. art. I, § 7–9. *See generally* Frank R. Brushaber v. Union Pacific Railroad Company, 240 U.S. 1,

coincidence, or both (from the human perspective), the English Parliament fashioned into a form after the manner of the old Anglo-Saxon Witan and their moot assembly,[655] albeit for the added purpose of enabling ease of taxation. Simon de Montfort had first summoned a Parliament in order to gain support from powerful merchants and to create public awareness and support for his ideas and against those of Edward I. Then Edward I.—to the credit of his character—showed his loyalty to fixed constitutional forms of law and limited government by stressing and respecting the rights of Parliament to freely associate and speak without fear of retribution.

During Edward's reign, the barons shifted their ground from aristocratic self-interest, to representatives of the national interest, and then used the constitutional machinery to achieve these ambitions. "It was thus ironical, and to the King exasperating," writes Churchill, "that he found the principles he had emphasized applied against himself." With speed, Parliament assumed authority over Edward's craving for tax revenue and, as a result, Edward's ability to wage war. Henceforward, English kings and later American presidents, have been obliged to approach Parliament or Congress, with hat in hand, when requesting tax revenues for military exploits, war, or the general welfare. Unlike the civil-law tradition, were legislative power is all-embracing, unchecked,[656]

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36 S.Ct. 236, 60 L.Ed. 493 (1916) (a notable finding, concerning direct and indirect taxation).

[655] In the thirteenth century, Parliament—from Norman French *parler*, meaning to speak, discuss, or debate, and most important, negotiate, as with an adversary—began as a council assembled to receive and analyze the numerous petitions submitted to the king. Members of this Parliament soon discovered their own complaints and longings in the petitions they reviewed. Thus, as a group, they began to sign onto some of these petitions and submit them to the king, thereby further establishing the modern constitutional right of petition, while constituting a grand step toward the English and American common-law form of representative government. *See* U.S. CONST. amend. I. These petitions—having arisen from among the people, the assembly having endorsed them, and finally the Parliament having presented them to the king for approval—became, through this incipient form of procedure, the bills presented to the executive for signature as legislation.

In 1265, the upper house of Parliament (to become the House of Lords) consisted of five earls, sixteen barons, thirteen friars, eleven bishops, thirty-five abbots, and other lesser ranks. Altogether, one hundred and seventeen Roman priests sat in Parliament, outnumbering lay members. By 22 April 1509, when Henry VIII. came to power, two archbishops, twenty-four bishops, twenty-four abbots, and two friars were members of the House of Lords: totaling fifty-two Roman priests. Today, two archbishops and twenty-four bishops of the English Church sit in the House of Lords. Excepting these two archbishops and twenty-four bishops, all seats in House of Lords are hereditary. As understood under the British Constitution (unwritten constitutional custom), Parliament comprises not only the House of Lords and the House of Commons, but also the monarch, with whom the two houses parley.

[656] Though contrary to the common-law tradition, since the tumultuous seventeenth century in England, Parliament's power has been, in theory, unlimited. See generally §

and final; in the common-law tradition, legislative bodies have arisen foremost to control the executive's unpredictable hunger to lay and collect taxes, thereby bridling his ambition to wage war and to use tax enforcement power as part of a scheme to redistribute wealth and thus enable demagoguery.

The House of Commons is the nearest ancestor of the United States House of Representatives; the lawful functions of both are alike: to provide a fair sameness of power among those members of the population bearing the non-deferrable tax burden, by seating a representative from every district, each having the same number of residents.[657] Much has been made of the Greek and Roman ideals of republicanism, but no relationship such as that between the Parliament and those bearing the tax burden existed in the Greek and Roman republics. The Greeks and Romans never conceived a plan to provide for government's support that was palatable to the only ones unable to avoid or defer taxation: the producers of wealth by their harvest of raw materials or by their labor. If the Greeks and Romans had grasped the idea of taxation by representation, it might have enabled them to keep their forms of government—at least for a time longer.

In 1265, England began her House of Commons.[658] By this arrangement, King Edward I. introduced, by direct appeal, statutes reinforcing the common law as the law of the realm.[659] He then garnered

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3.11.4 of this book (discussing England's deviation from the common-law tradition by attributing to Parliament legislative supremacy). Nonetheless, English courts exercise independent interpretation over Parliament's legislation.

[657] The Founders designed the American Congress's House of Representatives around the ideal of equal representation for purposes of fair taxation. In addition, the Constitution's requirement of a census every decade is for determination of such equal representation. *See* U.S. CONST. art. I, § 2, cl. 3. Congressional representation is according to precise calculations of population: each congressional representative represents the same number of persons, so that in collecting taxes government will not take private property (taxes) from anyone without due process of law.

In short and in theory, each person, through his congressional representative, has an equal opportunity to be heard, in addition to his access to the courts. Bi-yearly elections of members of Congress, allocated among the states according to population, are another important part of due process under the Constitution. The Due-Process Clauses bar the federal and state governments from depriving a person of private property (in this instance by taxation) without due process of law. *See id.* amends. V, XIV.

[658] Englishmen called the Parliament's lower House the House of Commons because its members were commoners, i.e., not members of the nobility or peerage. Originally, commoners were those holding property rights in common with others to pasture their livestock on the *commons* or "waste." *Commoner* also became a shortened form of the term "common lawyer."

[659] Determined to further establish the common law throughout England, Edward I., as had his grandfather Henry II., made the common-law county (shire) courts available for local justice, while insuring that county courts record each of their judicial opinions at a

local support for these and saw Parliament enact them. Throughout all the legislation Edward introduced, "however varied its problems, there runs a common purpose: 'we must find out what is ours and due to us, and others what is theirs and due to them'."[660] In addition, Parliament passed statutes requiring consent of the Commons to levy taxes. Some of the statutes passed during Edward's reign resemble the American Constitution's Takings Clause,[661] which forbids government from taking private property for public use without paying just, i.e., fitting, compensation.

The record of history is unquestionable: regardless of the reasons for forming representative bodies (such as Parliament), so doing opens opportunity for men with common grievances to discuss them and develop common remedies; in short, fellowship of purpose results. The House of Commons protected and preserved—against civil-law-leaning English monarchs—the Americans' fundamental right of freedom of association and right of petition for redress of grievances.[662]

In actual operation, the early right to representation in Parliament differed from modern notions of universal suffrage: only landholders (freeholders) voted for representation in Parliament. In 1265, when the House of Commons began, there were fewer than 100,000 landholders in all of England. Since that time, however, common law has moved toward all-inclusive or universal suffrage. Limited suffrage enhances the awareness of the worth of the right to vote; unlimited suffrage, on the other hand, lowers the perception of the worth of the right to vote. Even in the United States suffrage has enlarged, the right to vote remains, nevertheless, precious enough that its worth is immeasurable in money. The law forbids sale of the right to vote, as was done in Rome, because to do so is to fix a value to a right of immeasurable worth; thus, any value affixed demeans the right. To be sure, regardless of the number of votes

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central location. Recordation of judicial opinions spread the common law's consistency by making previous court findings or precedent—the necessary ingredient of the common law's polestar doctrine, *stare decisis*—ready and available throughout all England. *Stare decisis* binds the courts to judicial precedent. Edward I., by attempting to preserve ancient common-law rights of freeholders, unwittingly exerted an effect on the common law that defined its history "from the thirteenth century down to the close of the eighteenth." T.F.T. PLUNKNETT, LEGISLATION OF EDWARD I. 156 (1949), *quoted in* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 216 (Liberty Fund 1974) (1966).

[660] CHURCHILL, *supra* note 62, at 210. "No English King," writes Churchill of Edward I., "more fully lived up to the maxim he chose for himself: 'to each his own.' He was animated by a passionate regard for justice and law . . . and for the rights of all groups within the community." *Id.* at xvii.

[661] U.S. CONST. amend. V. *See also* 2 *Samuel* 24:18–25.

[662] *See* U.S. CONST. amend. I.

cast, a single vote, in the context of a close vote, is decisive. In the United States, the right to vote is obtainable only with some measure of effort and commitment, such as willingness to serve as a juror. Such requirements maintain the substance and the awareness of the worth and dignity of the right to vote.[663]

By defeating the Anglo-Saxons battle at Hastings, William I. claimed landlordship of all the land in England. He then divided England's land among about 200 of his faithful men as free-holding tenants in chief (holding immediate to the Crown), upon the following condition: each tenant agreeing to provide the number of knights befitting the amount of land granted to him, outfitted for fighting (trained, mounted, and fully armed), for up to forty days a year. The obligation to provide the service of one such knight was called *one knight's fee*.[664] Tenure of land by knight's fee entitled the tenant to rights, profits, and benefits from the lands held, as long as he provided the number of knights befitting the worth of the land he held. In 1645, Parliament abolished tenure of land by knight's fee.

Later, because King John, strapped for money, demanded heavy monetary payments called *scutage*[665] in lieu of tenure by knight's fee,

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[663] Recent candidates for President have advocated allowing mere residents of the United States the right to vote without regard to citizenship or any other limiting requirement. Some argue that only citizens that pay taxes ought to hold the right to vote. This, however, is makes little restriction because most everyone in the United States—citizen or non-citizen—pays some tax somewhere. Therefore, by this argument, all residents, without any ascertainable limit, would have the right to vote. History has expanded recognition of the right to vote. Even at the time of the War of American Independence, England's electorate consisted of a small percentage of Englishmen: about 160,000 voters out of a population of some eight million. Statutes of 1832, 1835, 1867, and 1884 reduced property requirements for voting. Then, in 1918, Parliament abolished all such requirements. There are now no property requirements for voting in England or the United States.

[664] The amount of land befitting the levy of a single knight varied from one hide (160 acres) to six hides, depending on the harvest potential of the land. *See* 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. 254 (2d. ed. 1898). In Anglo-Saxon England, and even as the Normans came to administer the common law, government was limited to two duties: keeping the common-law courts open and respectful of due process—then called *the law of the land*, of which the Jury was basic—and the common defense.

Tenure by knight's fee kept government limited. The landholding taxpayer, by granting government the means for the common defense in kind, instead of in specie (paying money), kept government from unlawful diverting of taxes to other uses. In a word, the knight's fee insured the taxpayer that government will never divert and misuse his contribution, without his consent. For the same reason, the Constitution, art. I, § 8, recognizes the common-law militia; the Second Amendment and the common law recognizes the duty each militia member to furnish his own arms and training. Thus, as did the knight's fee, the Constitution provides for the common defense largely in kind, instead of in dollars, in order to limit government power and unlawful spending.

[665] Latin *scutum*: "shield (money)."

Magna Carta forbade levying of scutage without the consent of the general council. Abolition of scutage deprived the Crown of most feudal revenues. Then, in 1689, Parliament officially placed two restrictions on the Crown that were, in principle, carried forward by the American Constitution: *first*, the Crown must have Parliament's consent to levy taxes; *second*, even though the Crown appointed judges, it must have Parliament's consent to remove any of them. Likewise, the federal power to tax lies alone in the United States Congress; and though the President appoints federal judges, the Constitution empowers only Congress to remove such judges from office, following two steps of due process: impeachment by the House of Representatives (much as indictment by the Grand Jury), followed by trial and conviction by the Senate.[666]

King George I.—preferring the beer in his native Hanover, Germany to tending business in England—was often absent, spending at least a fifth of his reign in Germany.[667] In 1716, Parliament repealed its restrictions upon his being absent from Britain. Leaving power in the hands of trusted men, he always managed to be in England on payday. George I., by seldom minding the affairs of government, almost never meddled with the free-market impulses of the American Colonies. As a result, the Colonies thrived, which contributed to the English-Americans' financial confidence and sense of self-dependence.[668] King George II., preferring his mistresses to the affairs of government, never hampered the welfare of the American Colonies. Later, King George III., as a part of

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[666] *See* U.S. CONST. art. II, § 4 (identifying officials subject to impeachment), art. I, § 2 (lodging the power of impeachment in the House of Representatives), art. I, § 4 (providing lawful reasons for impeachment), art. I, § 3 (lodging the power to try impeachments in the Senate), art. I, § 3 (providing penalties in case of conviction).

[667] That a Protestant (one free from Rome's control) must hold the British Crown, overcomes a multitude offenses. Despite his unpopularity, the British saw Protestant George I. as a better choice than the Roman Catholic Pretender James, even though George longed for Hanover:

> [George's] heart was in Hanover. He was more than fifty-four years of age when he came amongst us: we took him because we wanted him, because he served our turn; we laughed at his uncouth German ways, and sneered at him . . . I, for one, would have been on his side in those days. Cynical, and selfish, as he was, he was better than a King out of St Germains [James the Pretender] with a French King's orders in his pocket, and a swarm of Jesuits in his train.

1 THE WORKS OF WILLIAM MAKEPEACE THACKERARY 16 (Pollard & Moss 1881). That the holder of the Crown be Protestant has remained a non-negotiable requirement since Henry VIII., and is a part of the British Constitution.

[668] Regardless of who is in power at any particular time—whether that person is good or evil, diligent or lazy, capable or incompetent—, history shows that Providence always allows opportunities to advance God's purposes, if one has eyes to see them.

Parliament, asserted the Crown's influence to bring the American Colonies into regulatory compliance.[669] The Colonies, however, having experienced the prosperity resulting from the lack of Parliament's regulation, saw Parliament's attempt to tighten control by enforcing its regulations a threat the freedoms and prosperity that had grown during the non-interventionists administrations of George I. and George II.

Unlike the United States Congress, the British Parliament, being the nation's political sovereign, can change the British Constitution by a simple majority vote; nevertheless, Parliament seldom does so.[670] In addition, the Crown plays its part in upholding constitutional limitations on the procedures of Parliament. For example, when King Edward VII. died in 1910, the Liberal Party introduced legislation that barred the House of Lords from blocking certain tax bills. The legislation required that if the House of Commons passed these tax bills a second time after the House of Lords had rejected them a second time, such bills, at the Crown's consent, became law. The king, however, disagreed, holding that both Houses of Parliament must consent to enact legislation; to require less, he said, will violate the British Constitution.

Britain now deems its Crown the non-partisan and *dignified* component of Parliament; the House of Lords and the House of Commons, by the Prime Minister and Cabinet, are said to be the *efficient* components. Thus, the unwritten Constitution of the United Kingdom limits the British Crown's parliamentary role to non-partisan functions of dignity. The British Crown, says Walter Bagehot, "has, under a constitutional monarchy . . . three rights—the right to be consulted, the right to encourage, the right to warn."

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[669] In the main and other than his troubles with the American colonists, George III. was a commendable fellow. At war with the colonists, George believed he was defending the right of an elected Parliament to levy taxes, not seeking to expand his own power or prerogatives. As was Edward the Confessor, George III. was a man of much prayer and was shocked at the immorality of his brothers. The long reign of George III. continued to reduce the power of monarchy and its growth as the embodiment of national morality.

Satirists dubbed George III. "Farmer George," at first to mock his interest in mundane matters rather than politics, but later to contrast his homely thrift with his son's grandiosity and to portray him as a man of the people. Indeed, George III., held a passionate interest in farming, through which the British Agricultural Revolution reached its peak, inspiring further advances in other areas of science and industry and bringing unprecedented growth in England's rural population, which in turn provided much of the workforce for the concurrent Industrial Revolution. In summation, disregarding the war with the American colonists, George III., taken all around, had the right ideals—he was even behind repeal of the hated Stamp Act. In the Providence of God, George III. brought about the United States.

[670] The English Constitution exists not in what is written; rather, written laws, court findings, and customs are evidence of the English Constitution.

§ 3.7.5
John Wyclif:
Case Law –*vs*– Tyrannical Law

Our universities began about that period to
receive their present form of scholastic discipline
that they were then and continued to be until the time of
the reformation, entirely under the influence of the popish clergy:
(sir John Mason the first protestant, being also the first lay chancellor of
Oxford) this will lead us to perceive the reason, why the study of
the common laws in those days of bigotry was pursued
with such alacrity in these seats of learning; and why
the common law was entirely despised, and
esteemed little better than heretical.[671]

Never has any mere man known, understood, and appreciated the depth and breadth of the difference between the common law and the civil law more than did John Wyclif. Moreover, never has any man acted upon his understanding of this difference with a more well-thought-out, prepared, and deliberate plan with such wide and lasting effect. Wyclif saw, in clarity, the accord of the common law with the Word of God written and the nexus between the two. In short, the common law is the outworking of the scriptural ideal. Wyclif also saw that evil goes afoot among a people in the priesthood of false religion and walks about the earth as the imperial state; that only by laying the ax to the sick root of evil will it lose sway; and that truth unleashed in its clear speaking overcomes all. Wyclif's life and clarity of belief, however, was the fruit of long-suffering discipline in obscurity.

As were Langton, de Bracton, and Fortescue, Wyclif was a churchman studied in the civil law—Langton being the initiator, author, and daysman between the parties to Magna Carta and Wyclif being the first man to translate the Bible into English, albeit from Jerome's Latin Vulgate. All four men espoused the common-law conviction that the law stands above the king. History knows John Wyclif by two titles: *flos Oxonie* (the flower, or pride, of Oxford) and "Morning Star of the Reformation." The first title he earned while teaching at Oxford; the second title historians have recognized in retrospect.

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[671] 1 BLACKSTONE, *supra* note 12, at 21. During the Reformation, says Blackstone, the Protestants at Oxford pursued the common law as the handmaiden of Scripture. Though such was a pervasive, powerful spirit at Oxford, this writer has yet to find that the Protestants at Oxford taught the common law by any *official* commission.

Through the centuries, men have claimed three sources as the fountainhead of government authority: true Deity, a semi-deified man, or an elite class of men such as a legislature or even a majority of the people as the voice of a god. Scripture, however, teaches that the origin of all authority, including government authority, is true Deity—the Godhead, as one and without disagreement.[672] In Wyclif's day, the disagreement over the true fountain and channels of authority had thrown England into flux: Does the individual receive authority only from the mediating Roman priests as they channel it through the sacraments? Or does God bestow His common authority upon all (by making each man in His image) and bequeath His peculiar authority to some (by implanting the seed of His written Word)?

Controlling the practical outcome of this question was the conflict between the civil law of Rome and the common law of England. By Wyclif's day, the revolution of papal power had reached its full swing; the civil-law lawyer-priests in control of England, now armed with scholastic training from the universities, were being assigned from the Continent and beginning to feel the swollen pride of intellectual superiority. "The study of the Civil law had raised up a body of lawyers, who in scholarship and self-confidence held no unequal rivalry with the theologians."[673] "The Pope," said Boniface VIII, in Wyclif's day, "holds all laws in his breast,"[674] but then came John Wyclif.

Wyclif was an unknown student at Oxford for thirty-two years and a professor there for eleven years more. Upon receipt of his doctorate at age forty eight, his influence in the Church, law, and government began in earnest. It is said that he was unrivaled in his skill to silence objections to his views by the sheer force of his mastery of facts upon which he founded his reason, which he had whetted razor-sharp through his obscure, yet intense, years of study, contemplation, and practiced oral defense of truth. In Wyclif's day, oral argument was a substantial part of learning at Oxford; done right, it was the best way to sharpen the mind. As oral argument disciplined his tongue and keen-edged his thinking, scriptural distinctions waxed sharp in his mind. For Wyclif, black became blacker and white became whiter.[675]

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[672] See generally app. 3 of this book (expounding אחד: '*echadth*, the Hebrew term for unity as one-*ness* in the consistency and integrity of the created order).

[673] 1 JOHN WYCLIF, THE ENGLISH WORKS OF WYCLIF HITHERTO UNPRINTED xxxiii (F.D. Matthew ed., Trübner, photo. reprint 2004) (1880) (capital letters in original).

[674] ROSCOE POUND, THE SPRIT OF THE COMMON LAW 41 (1921).

[675] That Wyclif had worked the grey areas of foggy understanding from his mind is according to church historian Ken Connolly. Connolly repeats Wyclif's motto, "Right is

Hitherfore, known only at Oxford and to his students there, moral outrage over happenings in England drove Wyclif into the light of public discourse; quick, he grasped the gravamen of the battle: the civil law of Rome verses the Scriptures, which also authorizes the common-law Jury[676] and case law. The civil law, said Rome, justifies Rome's dominion over England and domination of Englishman; to the contrary, said Wyclif, the Bible is God's grant of the Englishman's lordship over his country and bars the domination of any man over another. Moreover, by England rejecting the civil law, said Wyclif, the common law will expand in the courts and government. Roman civil law, he continued, is "heathen men's law"; there is no more reason and justice in the civil law of Rome, Wyclif continued, than in the common law of England.[677] "In his tract *De Officio Regis*, he attacked authority in [civil] law and asserted the sufficiency of English case law—for such it had fairly become—against the venerable legislation of Justinian and the sacred decretals of the Popes."[678]

Wyclif staked his position respecting English common law and Roman civil law:

> Against the Justinian Roman law and . . . canon law embodied in papal decretals, the two cosmopolitan legal systems which held sway over most of the western world, Wyclif asserted the sufficiency of English case law [precedent] as developed by the common-law courts.[679]

"It is not an accident," writes Dean Pound, "that the first reformer in English legal thought [Wyclif] was also the first reformer in English religious thought."[680] Wyclif insisted that study of the English common law replace study of the Roman civil law at Oxford and Cambridge.[681]

Wyclif then reduced the struggle between the two traditions of law and government to the controlling question: Does God bequeath authority (lordship or dominion) directly upon the individual or does the imperial Roman Church bestow authority only to a chosen few clerics indirect from God through the priesthood? If direct from God, the

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right, and wrong is wrong, and right the day must win. To doubt would be disloyalty; to falter would be sin."

[676] See generally § 4.3 of this book (discussing the Jury in Scripture).

[677] *See id.* at 40.

[678] *Id.* at 39.

[679] *See* FORTESCUE, *supra* note 59, at xvii, *citing* Wyclif's tract *De Officio Regis.*

[680] ROSCOE POUND, SPIRIT OF THE COMMON LAW 39 (1921).

[681] *See* FREDERIC WILLIAM MAITLAND, ENGLISH LAW AND THE RENAISSANCE 52–54 (n.d.).

imperial church is of no consequence. Besides, said Wyclif, there is only one mediator[682] between God and man: the man Christ Jesus; if Rome, therefore, interposes herself between Christ and the individual, Rome is an usurper. Wycilf's teaching concerning dominion (authority) went to the depths of his conviction concerning human life and duty:

> [Wyclif's] teaching as to "Dominion," [was] important from the weight that he attached to it, and still more as having been the subject of more attack and misunderstanding than any other of his doctrines . . . The source and limit of Dominion was a question much discussed in the fourteenth century.[683]

As other men used of God, Wyclif was not a mysterious bolt out of the blue. Wyclif's understanding and conviction arose from long years of obscure hardship, submission to others, study, and experience. Being a mere man, he was subject to like passions as are we; the fascinating gravity of Wyclif's presence lay not in his supernatural greatness but in God's supernatural use of his natural humanity.[684] Wyclif's predecessors, less known but indispensable influences into his life, provided strength of spirit for the task given him; one sows, another reaps. Reaching through the centuries by way of Wyclif's teacher Richard Fitzralph, even the life and biblical conviction of Patrick,[685] the first Christian missionary to Ireland, touched John Wyclif.[686]

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[682] In 1 *Timothy* 2:5, Paul the apostle uses *μεσιτης* (*mesitays*): "mediator." A lawyer, being his client's agent, identifies with both his client; being an attorney and as an officer of the court he also identifies with judge. Likewise, Christ Jesus, being at once both the Son of God and Son of Man, identifies himself with the only God (*εις θεος: eis theos*) and with men (*ανθρωπων: anthropoen*). As high priest, He pleads with God on behalf of men; as the greatest prophet, he pleads with men on behalf of God, having oneness with both.

By every available tool of grammar, the construction of the words in 1 *Timothy* 2:5 magnifies that Christ Jesus is like unto us as a son of Eve, born of a woman (yet without sin); while also like unto God, being conceived of God the Holy Spirit. In this verse, Paul weds Old Testament Hebrew construction with New Testament revelation. The entire verse forms a description of Jesus Christ. The writer suggests the following translation to be true to the Greek text and reflective of the Old Testament verses it builds upon: "Yes, one God, indeed one mediator from God and from man: [the] man—Christ Jesus." Translators sometimes use the word *between*, thinking it brings clarity, though it is not in the text: *εις θεος εις και μεσιτης θεου και ανθροπων ανθρωπος Χριστος Ιησους*. Moreover, *between* is redundant of *μεσιτης* (*mesitays*): "mediator."

[683] *Id.* at xxxii.

[684] *See James* 5:17.

[685] About A.D. 400, Irish pirates, commanded by one O'Neal, kidnapped Patrick, son of Culparnius, a church elder living south of Dumbarton at Bannavern on the northwest coast of England, while playing near the seashore with two of his sisters. O'Neal sold him into Irish slavery; a petty chieftain bought him and put him to herding hogs. At birth, his

Richard Fitzralph, Archbishop of Armagh in Northern Ireland and teacher of John Wyclif, taught from the Bible that no member of fallen humanity or any mundane institution of church or state rightly stands as mediator between God and man. God, said Fitzralph, allows each individual's relationship with Him to be immediate and direct only, in Christ: at once fully God and fully man, the fountain and agency of all authority.[687] Further, Christ dispenses all authority[688]—whether meant for family, church, or government—to the individual by God's Word, to be exercised according to God's terms, and to whom the individual bears direct responsibility. For example, Christ informed Pilate, "You have not even the least authority [delegation to act] against me unless it had been granted *to you* [i.e., direct] from above . . . ."[689] Such was the basic understanding of John Wyclif.[690]

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parents named him Succat; now enslaved, his master called him Patrick. "I was sixteen years old," Patrick years later said, "and knew not the true God; but in that strange land the Lord opened my unbelieving eyes and, although late, I called my sins to mind and was converted with my whole heart to the Lord my God, who regarded my low estate." 1 D'AUBIGNÉ, *supra* note 19, at 28–29. Through Patrick's work, Armagh came about as a center for Bible translation, study, teaching, and as a base for evangelism. This college preserved biblical truth, enabling its eventual delivery to John Wyclif through his teacher, Richard Fitzralph.

[686] Despite eventual Roman seduction, the effects of Armagh college's devotion to the Scriptures reached from the fifth century, clean through the twelfth century to Richard Fitzralph, then to John Wyclif: the fourteenth-century champion of common-law first principles through the first known complete translation of the Bible into English. During these seven centuries, Armagh's college remained a seat of biblical learning and wide evangelistic influence, keeping independence from the English and Roman Churches and, consequently, from Rome's civil and canon law. Armagh's independence from Roman influence accounts for Wyclif's aversion to civil-canon law. Though the beginning of Rome's seduction of Armagh dates from the Synod of Kells in 1152, the full force of that seduction came much later. *See* HUGH J. BLAIR, DICTIONARY OF THE CHRISTIAN CHURCH 69 (J.D. Douglas ed., 1978).

[687] *See Matthew* 28:18. Authority is jurisdiction: the right and responsibility to act concerning a given matter.

[688] Even the power of Satan is from God, to whom Satan is responsible. Even though man's adversary is the powerful Devil, said Martin Luther, for all his terror and rage he is still *God's* devil. Satan acts only within the limits allowed to him by his Creator.

[689] *John* 19:11 (emphasis added). *Ανωθεν* (*anothen*) signifies that which a person receives direct from its ultimate source. Writers used the term to denote documents copied direct from the original, in contrast to copies that are copied from copies of the original, i.e., indirectly.

Consider, for example, a papyri dated A.D. 186, showing that *anothen* denotes an exact reproduction of a particular item, which is, in this example, a reproduction of a legal document: *οπερ ου καλος ενδεχεται ει μη ανωθεν γενωιτο αντιγραφα* (This will not allow an accurate appearance unless copies are made *from the original or source*). JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 50 (1930). Christ uses *anothen* to describe those born direct from God, born from above by spiritual birth: i.e., sons of God, offspring.

Two things moved John Wyclif to translate the Bible into English. *First*, he had grown weary of the willful ignorance of the so-called educated men of his day (the Roman priesthood) to understand fundamental truths of the Scripture and the inability to apply them to life and government through the channels of the common law.[691] *Second*, zeal had gripped Wyclif that God had created each person—regardless of his station in life or level of education—in God's image, endowed him with rights and bestowed upon him authority to discharge two duties: service to others and lordship over creation in keen thought and sharp obedience to Holy Writ:

> Cristen men and wymmen, olde and yonge, shulden studie fast in the Newe Testament, for it is of ful autorite, and opyn to undirstonding of simple men, as to the poyntis that be moost needful to salvacioun . . . Therefore no simple man of wit be aferd unmesurabli to stuie in the text of holy writ . . . and no clerk [priest] be proude of the verrey undirstondyng of holy writ . . . undirstonding of hooly writ with outen charite [Middle English (Mercian): *active love*] makith a man depper dampned [damned].[692]

With this principle in view, William Tyndale chose the term *author* to translate *αρχηγος* (*arkagos*). Being difficult to improve upon, Tyndale's choice has survived into a number of English translations, "Looking unto Jesus the *author*, and finisher, of [our] faith. *See Hebrews* 12:2. Since an author is, by definition, authority's origin, Tyndale calculated that this term best expressed that saving faith is only from God and not "f*rom*" ["from": ablative of source] the one saved. As says Scripture, "Further [*γαρ* (*gar*): "the fact is"], you are saved by grace, through faith, even *that* [is] not from you, [it is] the gift from God . . . ." *Ephesians* 2:8–9."

[690] See generally § 3.7.5 of this book (discussing Wyclif's understanding from Scripture of the source of authority).

[691] John Wyclif held the Scriptures to be the indispensable foundation of the common-law tradition that must abide in the minds of all Christians, viewed common lawyers as guardians of the common-law tradition, and saw civil lawyers and canon law as the immediate danger to the Scriptures and to the common-law tradition. Thus, Wyclif translated the Scriptures into English and encouraged all to read them. He reprimanded common lawyers that encourage quarrels (barratry), suborn perjury, pack juries, oppress the poor, and pretend religion. He condemned canon lawyers as worst of all, however, because they hold the civil law above the Scriptures. Civil law, said Wyclif, is "sinful menus [mens] lawis [laws] ful of errour . . . not the beste lawis for to reule cristene menn*y*s [men's] soulis." 1 JOHN WYCLIF, THE ENGLISH WORKS OF WYCLIF HITHERTO UNPRINTED 181–84 (F.D. Matthew ed., Trüubner, photo. reprint 2004) (1880) (archaic spelling in original).

[692] CHURCHILL, *supra* note 62, at 265, *quoting* Wyclif (inconsistent spelling in original). Consistent spelling never became a part of written English until Sam Johnson published the first dictionary of the English language. Consistent spelling of written English never become universal in America until after World War II. Men spelled words according to the sounds of their local dialect, which often admitted of more than one spelling.

Because every page of the Bible reveals something of the absolute sovereignty of God, John Wyclif knew that his countrymen's access to the Bible will keep in the national consciousness the common-law tradition of limited sovereignty of man's government. The *breadth* of Wyclif's aspiration was national, but to achieve his aspiration, he chose the weapon calculated to reach into the *depths* of the individual's heart and soul, cutting to the quick; only the two-edged Word of God can inflict such a piercing[693] and then enliven.

Two well-known events of the year 1215 fueled Wyclif's conviction: Rome's official declaration of the doctrine of transubstantiation and the signing of Magna Carta. Wyclif determined to magnify the common-law principles Magna Carta had set forth and to refute Babylon's doctrine of transubstantiation; to do both, he used the Bible put into English. Wyclif saw that the key to reforming both the English Church and government was to translate the Bible into English so that the laymen will know more of it than do "haughty prelates," who were then using Roman civil law to control the Church[694] and were attempting to use it to dominate Parliament. "He that can cracke a litil latyn in . . . menus lawe & worldly prestis lawe [civil & canon law] . . . ," writes Wyclif, "is holden [held] . . . wys [wise], though he kunne [can] not rede wel a vers . . . in holy writt."[695]

Not only did Rome's official declaration of the doctrine of transubstantiation and King John's signing of Magna Carta move Wyclif to moral outrage, but these events also defined his strategy to refute them. Wyclif, by translating the Bible into English, intended first, to further establish the principles of Magna Carta as a fresh articulation of common-law first principles; and second, to refute transubstantiation. He believed that widespread knowledge of God's Word written will impress these two goals into the individual consciences of his countrymen. To these ends, at Oxford University, Wyclif sought to replace the emptiness of scholasticism's methods—the foundation of Roman theology and civil law—with both study of the Bible and of the common-law tradition. Wyclif held Rome's transubstantiation to be contrary to Scripture because it denies the sufficiency of Christ' sacrifice

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[693] *See Hebrews* 4:12, stating that the Word of God is *τομωτερος υπερ πασαν μαχαιπαν* (*tomoteros huper pasan machaipan*: by the letters, "*more*-cutting *above* every double-edged sword."

[694] Under Roman doctrine, then as now, the church includes only the ordained priesthood of Rome; it precludes the laity. The Bible, on the other hand, defines the Church as all those, high born or low, respected or despised redeemed by God.

[695] 1 JOHN WYCLIF, THE ENGLISH WORKS OF WYCLIF HITHERTO UNPRINTED 156–57 (F.D. Matthew ed., Trüubner, photo. reprint 2004) (1880).

and is contrary to the senses. He held Justinian's Code and Rome's canon law wholly dependent upon the human mind and void of the natural (common) sense given direct to each individual and provided by case law.

With these convictions and purposes in mind, Wyclif adopted the *strategy* of Scripture: overcome evil with good. His *tactic* in executing this strategy was to supplant the doctrine of transubstantiation with the Word of God. His *method* for executing this tactic was to translate the Bible into English, thereby enabling a critical mass of his countrymen to develop a foundation of conviction concerning the all-sufficiency of Christ as the Author of liberty, supplanting the doctrine of transubstantiation, and encouraging practice of Magna Carta's common-law precepts of liberty.

God used Wyclif's strategy, tactic, and method to weave scriptural principles into England's religious and political life through the common law's precepts articulated in Magna Carta. The resulting benefits have proven immeasurable. Wyclif believed that the rise of biblical truth in the hearts of individuals will strengthen personal and political liberty for all men and that Rome's civil law—foisted upon England through the church's canon law—was contrary to that liberty. In November of 1382, Wyclif petitioned the House of Commons:

> Since Jesus Christ shed his blood to free his Church, I demand its freedom. I demand that everyone may leave those gloomy walls (the monasteries) within which a tyrannical law prevails (Roman law), and embrace a simple and peaceful life under the open vault of heaven. I demand that the poor inhabitants of our towns and villages, be not constrained to furnish a worldly priest, often a vicious man and a heretic, with the means of satisfying his ostentation, his gluttony, and his licentiousness—of buying a showy horse, costly saddles, bridles with tinkling bells, rich garments, and soft furs, while they see their wives, children, and neighbors, dying of hunger.[696]

That John Wyclif was a friend and associate of Geoffrey Chaucer is likely because Wyclif's patron and strongest political ally was John of Gaunt, Geoffrey Chaucer's brother-in-law. Besides being a well-known poet, Chaucer was a Serjeant-at-Law. It is also likely that the two mutually influenced one another in a common purpose of Church

[696] *A Complaint of John Wycliffe*, TRACTS AND TREATISES 268 (Wycliffe Society ed., n.d.), *quoted in* 1 D'AUBIGNÉ, *supra* note 19, at 95 (parentheticals in original).

reformation on two fronts: first, translation of the Bible into English; second, invocation of the common law as a defense against the civil law of the imperial church.

Having traveled common paths, Chaucer (common lawyer and poet) and Wyclif (Bible translator and author of prose) remain complementary influences. Wyclif, for his translation of the Bible into English, and Chaucer, for his poetry, both chose the East-Midland English dialect. Chaucer presented facts and grievances to his country in palatable poetry; Wyclif provided the Bible in English as a measuring stick whereby to assess those facts and grievances. The Roman Church threatened both men's lives, forcing Chaucer to flee to Holland and trying Wyclif for heresy. Wyclif was not a revolutionary on a futile bout to change the past, but a reformer on a worthy quest to secure the future by upholding truth, by that time forgotten.

Only God, through His Word, gives right meaning to every fact and all things, including, for example, the common law, Magna Carta, and our Constitution. Translation of the Scriptures into English allowed widespread contemplation of divine truth and the conviction needed to uphold the common-law principles that had arisen from the natural yearnings of men, according to *Romans* 2:14–15.

§ 3.7.6
John Fortescue:
Limited King –*vs*– Absolute King

In 1461, John Fortescue, Chief Justice of the King's Bench during the reign of Henry VI., fled into French exile for his conviction: the law is supreme over the king. While in exile, he wrote *De Laudibus Legum Angliae* (*For Praise of the Law of the English*), by which he demonstrates the excellence of the English law—that it stands above and limits the king—by contrasting it with the absolute monarchy of France. He also includes a description of the common law for non-lawyers.

By contrasting the common law with the civil law, Fortescue stressed two excellencies of the common law. *First*, each person must honor the *law* above the *will* of the king, instead of following the civil law by honoring the will of the king as the law. *Second*, the common law defines one's legal rights and duties only according to the category of one's relationship with another. By contrast, the civil law defines one's legal rights and duties according to the imperious will of the state. Common law recognizes eternal law according to the rights attending freedom of

association, i.e., relationships; civil law is the present imperial command, measured by the will of the state to use available power to enforce it.

§ 3.7.7
Præmunire:
Common-Law Patriotism

God demands undivided loyalty. This means undivided devotion to His Word written and ideals welling up from it and bars devotion to any man or combination of men ruling by a single will.[697] Indeed, divided loyalty is no loyalty at all. Loyalty is a total concept, a mere fiction in any lesser form. Upon division, loyalty, now less than total, is disloyalty. Thus, the phrase *divided loyalty* is a misnomer, a contradiction of terms, impossibility. Further, loyalty to God always includes loyalty to the ideals of one's country that are consonant with God's character and in submission to His character. Sound patriotism is loyalty to God's ideals for one's country and pursuit of those ideals.

As the English Reformation began to see the debilitating effect of attempted devotion to two contrary traditions of law and government—the total imperial church-state of Rome and the ideals of limited common-law government—circumstances and events brought into focus and high resolution the importance of patriotism.

Præmunire was the criminal offence of compromising English sovereignty—in the earthly, limited sense—by any of three acts: swearing loyalty to a foreign power, appealing to a foreign power, or by extension, swearing an oath to a foreign power. The standard of *præmunire* was front and center in Wyclif's contest with Rome; he believed these common-law prohibitions to be consonant with Scripture. "No one," says

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[697] For example, when a person speaks of patriotic loyalty toward America, but means by this that patriotic loyalty is to his leaders in government, his loyalty is misplaced. Loyalty to sinful men is a civil-law doctrine. If, on the other hand, he means loyalty to America means loyalty to America's ideals that are consonant with God's character as revealed by God's Word, he has properly placed his loyalty because devotion to the ideals of God founded upon a relationship with Him is devotion to God. Thus, our national motto *In God we trust*, acknowledges the necessity of individual and exclusive dependence upon God, and never upon any man or men, in order to experience liberty.

Scripture expresses this concept by contrasting the *fear of the* LORD (יראת יהוה: *yi-rath Yaweh*) with the *panic* or "trembling" of man (חרדת אדם: *ke-radath 'adam*). The fear of the LORD is the only fear Scripture authorizes (indeed requires); further, according to 1 *John* 4:18, this fear is not a fear of God's punishment, but rather, is a drive to please God welling up in response to His gift of redemption. The sum of all Scripture's commands does not outnumber the sum of Scripture's admonitions to not fear any man or thing except God, the Creator of heaven and earth.

Christ, "has an ability to serve two masters."[698] At John Wyclif's urging during the fourteenth century, Parliament, by its Act of Præmunire, enforced this common-law standard; to violate it was treason.

Præmunire, says Sir William Blackstone, is "[a] barbarous word for *praemonere*." It means, "forewarning." The term first appears in English law as the introductory words of the writ of summons issued to a defendant to answer charges under præmunire: "Præmunire facias A.B.," & etc., i.e., "cause A.B. to be forewarned" by serving upon him this writ.[699] In a word, to violate the law of præmunire was to appeal to a power outside of England for resolution of a conflict subject to English jurisdiction. In practice, Parliament intended to bar appeal to Roman tribunals or the tribunals of civil-law countries under Rome's sway. Moreover, the common-law held each person forewarned against dividing his loyalty by two means: the consensus of common knowledge and the act of Parliament.

In 1392, Parliament passed the Act of Præmunire with two immediate intents: to enjoin Richard II. from purchasing bulls from Rome in support of the pope's and Richard's will; to bar all other forms of papal usurpation of power in England. From the beginning of the fourteenth century, the Roman pope had attempted to replace the English common law with Justinian's Code by encouraging Englishmen—from the King to the villein—to resort to the pope and his curia (civil-canon law tribunals), rather than to the common-law courts of the country (trial by jury), for resolution of their legal disputes.

The Statute of Provisors (1306), said Sir Edward Coke, became the foundation of all following acts of Parliament concerning præmunire. Of all such acts, the following language was basic: "[N]o tax imposed by any religious persons should be sent out of the country whether under the name of a rent, tallage, tribute or any kind of imposition." With the Act of Provisors (1350) and the Act of Præmunire (1353), Parliament struck its heaviest blows against the imperial pope. At bottom, Parliament aimed these acts at two papal threats to the foundation of English common-law freedoms: control of England by a foreign emperor wielding the imperial civil law and control of England by this same foreign emperor's control of property in England through his agents. Consider, for example, Parliament's 1350 Act of Provivors:

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[698] *See Matthew* 6:24. *See also Matthew* 12:30: "The one not being with me is against me." See generally 1 D'AUBIGNÉ, *supra* note 19, at 77–78, 82, 133, 488, for information concerning, and surrounding circumstances that enhanced, the significance of *præmunire* in England. *See also* 2 *id.* at 56, 59, 309.

[699] *See generally* 4 BLACKSTONE, *supra* note 12, at ch. 8 (discussing præmunire).

> [T]he Pope of Rome, accroaching to him the seignories of possession and benefices of the holy Church of the realm of England doth give and grant the same benefices to aliens which did never dwell in England, and to cardinals, which might not dwell here, and to others as well aliens as denizens, as if he had been patron or advowee [civil-law *advocate*] of the said dignities and benefices . . . .

Parliament's 1353 Act of Præmunire was the first act so called; though leveled at the arrogance of Rome's civil-canon law tribunals (the Roman curia), it omits direct reference to Roman law and tribunals: "[A]ll the people of the king's ligeance of what condition that they be, which shall draw any out of the realm in plea . . ." The one having been served with the writ had two months from the date service to show cause why the court should not hold him in contempt for transferring his plea abroad. Failing to show good cause carried heavy penalties: loss of civil rights; forfeiture of lands, goods, and chattels; and imprisonment.

As the Protestant Reformation unfolded, præmunire resurged. Few were indicted under præmunire because—as today in the United States—few had standing to appeal to a foreign tribunal for help and less had any cause to appeal. The entire Roman priesthood in England, however, each by swearing loyalty to the pope, had eschewed loyalty to the law of England and brought themselves under indictment for being agents of a foreign power. In short, the priesthood, as one, had played the traitor.

First Wyclif, and then Parliament, recognized that the English priest's oath of loyalty, sworn to the bishop of Rome, compromised his loyalty to English sovereignty. Moreover, the two oaths were, at their foundations, opposed, resting on contrary principles of law. Thomas Cromwell, advisor to Henry VIII., urged against the priests' oath, told Henry that no man is able to serve two masters without destroying his loyalty to one of them: the priest's oath to the pope, said Cromwell, overrode his loyalty to English sovereignty.

Henry VIII., ever quick to grasp political opportunity, understood Cromwell's point. Added to the offence of the priests' disloyalty, the pope commissioned emperor Charles V to invade England. These dual offences exceeded Henry's toleration. Determined to beat the pope to the punch, Henry acted: he confiscated Roman Church property in England,[700]

[700] Confiscation of Roman Church property meant closing of monasteries. Politically, this was a popular action because at least since Wyclif's time the debaucheries of the monastic orders in England had brought public moral outrage. However, before closing the

thereby plugging the flow of money out of England to Rome (Peter's pence); acting with the advice and support of England's attorney general and Parliament, he demanded from all Roman priests in England, evidence of single loyalty. Because the priesthood in England, to a man, had sworn their oath of loyalty to the Roman pope, England's attorney general concluded that by dividing their loyalty between Rome and England, Rome's priests in England had violated the Act of Præmunire, the common-law prohibition against treason. Parliament, for the same reasons, also concluded the priests guilty of treason.

Cardinal Wolsey's violation of *præmunire* was the immediate cause of his prosecution, terminating his tyrannical reign. Wolsey—Rome's last priest to hold the office of Lord Chancellor of England—had alone ruled England in fact for seven years. Moreover, claiming authority from pope Boniface VIII's *Unam Sanctam* bull, Wolsey had displaced Magna Carta's first principles of adversarial due process with the civil law's inquisitorial devices. Wolsey's imperial grip on England was total: during the seven years of Woolsey's power, Parliament never met once.

Præmunire's concept holds present application respecting American patriotism. One's allegiance to a foreign power, individual potentates, international organization and groups, whether claiming to be neutral or religious, destroys one's loyalty to the Constitution and laws of the United States, thus, ending one's loyalty to the United States. True allegiance is indivisible. Divided loyalty is disloyalty. It is impossible to be devoted both to the common-law fundamentals of the Constitution and to the civil-law fundamentals of foreign powers.[701] The true patriot is motivated by his sense of duty to the charges God has specially given him, that is, to defend himself, his family, and the well-being of his country and to resist government abuse of power. He rejects the notion that patriotism means obedience to the state or any person, except the

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monasteries, the Crown commissioned an internal investigation of the monasteries, followed by a full report, publishing the unbridled lewd behavior found in them.

[701] See generally FREDERIC BASTIAT, LAW 34–35 (Dean Russell trans., Irvington-on-Hudson, New York, Foundation for Economic Education 1970) (1850), for the civil-law (Babylonian) notion of patriotism as understood by the ancient Egyptians:

> One of the things most strongly impressed . . . upon the minds of the Egyptians was patriotism. . . . No one was permitted to be useless to the state . . . Moreover, each occupation was assigned . . . ."

Id. quoting Bossuet (tutor to the Dauphin in the Court of Louis XIV).

God of creation; he embraces the ideal that patriotism means loyalty to true law.[702]

§ 3.7.8
Edward Coke:
Due Process –*vs*– Absolute King

Sir Edward Coke (lived 1552–1634, pronounced *Cook*) was an English judge and common lawyer of renown. A foremost champion of the common law's supremacy over kings, Coke defended against encroachments of the civil law from two quarters: Rome's equity courts and the royal prerogatives of the Stuarts, especially James I. (reigned 1603–1625). Coke, after graduating from Trinity College at Cambridge, obtained a good law practice. In 1571, he became a reader at Lyon's Inn; in 1578, a barrister of the Inner Temple; then, for a short time, a Member of Parliament. In 1592, to the chagrin of Sir Francis Bacon (lived 1561–1626), Coke received appointment to the office of attorney general, which began a long rivalry between these two men that included Coke's successful courtship of Lord Burghley's daughter, whose affections Bacon also strove to win.

In 1606, the Crown appointed Coke as Chief Justice of Common Pleas; while at this post, Coke's conflict with James I. began. During the years 1607–1608, James asserted his personal right to tax imports and exports. Coke, however, found unlawful any attempt of the King to lay taxes, arguing that the power of taxation rested in Parliament alone. Then, in a series of judicial findings against civil-law power, Coke further offended James I. For example, Coke resisted Archbishop Bancroft's (1544–1610) claim of authority—which James I. favored—to remove disputes involving the Church from the common-law courts to the Church's civil-law courts. Further, in 1610, Coke found against the king's authority to make law by decree (the divine right of kings). Then, in 1611, Coke resisted Archbishop Abbot's (1562–1633) attempt to remove ecclesiastic cases in the common-law courts to the Court of High Commission, another civil-law court.

Coke's checks against the Crown's attempts to infringe English freedom by infringing upon the independence of common lawyers and

[702] At present, dual citizenship is available to Americans; some, for example, hold citizenship of both the United States and Canada. As long as the ideals and interests of both countries is fundamentally the same, dual citizenship is acceptable. If, however, the ideals and interests of the two become opposed, the one holding citizenship of both must chose.

the common-law courts stymied James. Thereafter, he knew that to enjoy the exercise of absolute power, he must buy the convictions of Lord Coke—a futile notion. Nonetheless, Lord Bacon, seeing opportunity in the frustration of James I., suggested to His Majesty that he appoint Coke to a seat on the highest royal Bench, where Coke will feel (it was hoped) more-inclined to uphold royal power. Thus, in 1613, James appointed Coke Chief Justice of the King's Bench, but his scheme fell flat: Coke never wavered, still insisting on the king's legal inferiority to the common law and Parliament.

Coke's doggedness gave the ever-bitter Bacon further opportunity to exact the vengeance for which he longed. Indeed, some speculate that Bacon, knowing Coke's convictions were not for sale, had recommended Coke's appointment to the King's Bench simply to relish Coke's inevitable public dishonor. After listening to Bacon's demeaning remarks about Chief Justice Coke, James I. exerted power: he suspended Coke from his seat on the Privy Council, ordered him to expunge from his *Reports* opinions unfavorable to the king's prerogative of divine right, then because Coke refused, James demoted Coke from the position of Chief Justice to Associate Justice.

Nonetheless, Coke, now from his lesser position on the Bench, evermore resisted the Crown's trespasses into the jurisdiction of Parliament and upon the independence of the judiciary. In the open, he criticized the Crown's marriage into the Catholic Spanish royal family,[703] denounced meddling with the liberties of Parliament, and served on the committee to impeach Bacon. With these three actions, however, Coke overplayed his hand; in 1622, James put Coke in the Tower. Never dissuaded, upon his release, he gained a seat in Parliament; from there, he opposed the demand of King Charles I. for government subsidies to private concerns. Having now tasted the force of lawless power during his imprisonment in the Tower, Coke had become wiser; sensing danger, he retired to Pogis. Charles I. had Coke's papers seized—among which were the sequential portions of Coke's famous *Institutes of the Laws of England* (published 1628)—and held these in custody until 1641, thereby

[703] Marriage of the English sovereign to a Spaniard could have introduced the Germanic folk law's community property back into England. "Community property law," say Huston, Price, and Treacy, "developed from Germanic tribal practices introduce in Spain following the fall of the Roman Empire." *Quoted in*, ROUNDS, *supra* note 363, at 172. "Early immigrants to the Spanish possessions in the New World carried with them elements of the Spanish Legal system." *Id.* Having also persisted among the Germanic tribes in France, the French, as did the Spaniards, carried community-property laws to the New World.

delaying publication of the second edition until 1642 and 1644, posthumously.[704]

Lord Coke's high regard for the common law is especially relevant to the American experience; for it was during the zenith of Coke's activity and influence that English settlers set forth their colonial charters in the New World, guarantying to the settlers and their heirs, all the rights and immunities of free and natural Englishmen. As our forefathers developed laws for the Colonies, they also included freedoms guaranteed by Magna Carta and the 1689 English Bill of Rights.

Though not all colonial lawyers received legal training in the English Inns of Court, the Colonials remained intimate with English common law. During one parliamentary debate in the late eighteenth century, Edmund Burke observed of the Americans, "In no country, perhaps in the world, is law so general a study." Colonial American law students such as John Adams, Thomas Jefferson, and James Madison learned of the spirit of the common law behind Magna Carta through Coke's widely read four-volume *Institutes of the Laws of England*. Of Coke, Jefferson wrote to Madison, "[A] sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what were called English liberties." It is understandable, therefore, that as the Colonists outfitted and primed for war with Britain, they looked for justification to Magna Carta and to the preeminent student of its principles, Justice Edward Coke.[705]

§ 3.7.9
John Fuller:
Right to Silence –*vs*– Forced Oath

Nicholas Fuller (lived 1543–1620), Hebraist, theologian, and barrister at Grey's Inn, though forgotten, defended case by case in open court, his clients' rights of individual conscience. Puritans facing forced examination of their consciences in the Star Chamber-like proceedings of the High Commission by the forced oath *ex officio*, retained Fuller for legal counsel. When the King tried to remove Puritan ministers from their offices, Fuller blocked proceedings against them in the ecclesiastic

[704] The foregoing four paragraphs *excerpted and edited from* (n.a.) *Online Library of Liberty* (visited 21 Apr. 2006) <oll.libertyfund.org>.

[705] The foregoing paragraph is excerpted and edited *from* Janel McCarty, *National Archives and Records Administration* (visited 21 Apr. 2006) <www.magnacarta.com>.

courts by removing their cases to the common-law courts, where the law recognized the right to remain silent.

For following Fuller's advice by refusing to take the oath and testify against themselves, but instead remaining silent, the Star Chamber and the High Commission priest-judges jailed Fuller's clients for contempt. In response, Fuller often appealed to the judges of the common-law court of the King's Bench for the Writ of habeas corpus. "They [Fuller's clients] ought to be released," Fuller argued, "because the High Commission has not been empowered by law to fine or imprison, neither to administer oaths."[706]

Fuller's argument before the King's Bench threatened the power of priestcraft. The priests, having neither authority over proceedings before the King's Bench nor any part therein, struck back by summoning Fuller to appear before them to testify. Fuller, however, followed his own advice to his clients and refused the oath, whereupon, the priests threw him in Fleet Prison under a heavy fine. The justices of the King's Bench, fearful of King James's displeasure, refused to act and thus failed their duty to use the law to protect Fuller.

The Star Chamber and High Commission tribunals were arrogant and vicious: if the priest-judges sitting there felt a man's or woman's speech lacked enough respect to satisfy their priestly sensibilities, they ordered such an one whipped. For light offences, men and women were hanged, branded on the cheek, or had their noses or ears loped off. "It was a ghastly spectacle that the passengers across London Bridge beheld skeletons hanging in chains and swinging in the wind. Those who passed beneath the temple gate saw rows of skulls grinning from them upon the parapet."[707] Thus, at known personal peril, barrister John Fuller resisted the doctrines of the civil law.

In the face of the High Commission, the common-law courts, the Privy Council, and the King, Fuller denied all claimed royal prerogative to grant authority to the High Commission and its inquisition over the conscience of the individual. To the priests of the High Commission, Fuller protested, saying their procedure was "popish, under jurisdiction not of Christ but of antichrist."[708] Exacerbating the effect of this

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[706] CHARLES CARLETON COFFIN, SWEET LAND OF LIBERTY 85 (photo. reprint 1992) (1881).

[707] *Id.* at 85–86.

[708] In those days, the term *antichrist* retained its biblical meaning: an unauthorized mediator between Christ and the individual. See generally 1 *John* 2:18, 22; 4:3; 2 *John* 7, where John uses the equivalent Greek phrase (*αντι χριστος: anti christos*, English, antichrist), signifying *in the place of* and "equal to," but not openly "against" Christ—though to claim equality with Christ is to be deceitfully against Christ.

offending truth, he added that the bishops were embezzling the fines of the poor, non-conformist preachers instead of paying them into the Exchequer. At such times before magistrates, "the answer of the tongue is from the LORD."[709]

Though others espoused common-law ideals in Parliament, Fuller was the first of the barristers of the Reformation to give legs to the common-law ideals of individual rights and then to persist in animating these in individual cases in the courts:

> It is true that Peter Wentworth, in known contravention of Elizabeth's wishes, had demanded liberty of speech in the House of Commons in 1576; that the election of Sir Francis Goodwin to Parliament . . . had furnished the pretext for a quarrel between the King and the House of Commons which had momentous constitutional results; and that two years later John Bate, a London merchant, took to law the question of import tax on currants. Yet in none of these cases was their actual constitutional opposition to the Crown . . . It remained for Fuller to attack the King's prerogative . . . When defeated on one ground he resumed the struggle upon a second, and then upon a third . . . .[710]

§ 3.7.10
John Lilburne:
Saxon Ideals –*vs*– Norman Judges

John Lilburne had held a captain's commission in Parliament's cause against the royalists. Captured in action, the royalists tried him and sentenced him to death, after which Parliament bluffed the royalist into releasing him. Lilburne then became confidant of Oliver Cromwell, returned to the front, and rose to a lieutenant-colonelcy. Because Parliament, once victor over the Crown, resorted to the civil-law inquisitorial devices that Lilburne had fought to end in England, he became disillusioned and vocal against Parliament.[711] Thus, late in 1637, Parliament, on a technicality, issued a warrant for Lilburne's arrest, accusing him of interfering with the prerogatives of Parliament.

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[709] *See, e.g., Exodus* 4:12, *Proverbs* 16:1, *Matthew* 10:18–20.

[710] Ronald G. Usher, *Nicholas Fuller: A Forgotten Exponent of English Liberty*, A. HIST. REV., July 1907, at 743–60.

[711] History is replete: power in a popular legislative body such as Parliament, unchecked and without limit, will become tyranny.

Seldom born are men such as "Freeborn" John Lilburne:

> John Lilburne proved to be, by any standard, the most remarkable person connected with the history of the origins of the right against self-incrimination . . . In extraordinary abundance—everything about him was extraordinary—Lilburne had an incomparable ability to dramatize himself and his cause . . . From 1637 when he was but twenty-three years old . . . until his death twenty years later, he managed to keep his government in a hectic state . . . Standing trial for his life four times . . . Yet he could easily have had positions of high preferment if he had thrown in his lot with Parliament or Cromwell. Instead, he sacrificed everything in order to be free to attack injustice from any source. He once accurately described himself as "an honest true-bred freeborn Englishman that never in his life loved a tyrant nor feared an oppressor." In his own day he was known as Freeborn John . . . He was obstreperous, fearless, indomitable, and cantankerous, one of the most flinty, contentious men who ever lived.[712]

"[I]f John Lilburne were the last man in the world," said a contemporary, "John would fight with Lilburne and Lilburne with John."[713] In 1649, during his trial for high treason, Lilburne successfully argued to the Jury that the jurors are judges of the law as well as the facts. When Lord Keble interjected, stating that the jurors were not judges of the law, Lilburne claimed principles of Anglo-Saxon justice and addressed the justices as "no more than Norman intruders."[714]

After Parliament imprisoned Lilburne in Newgate, he wrote pamphlets showing how Fuller's *Argument* and Coke's commentaries on Magna Carta in the second volume of his *Institutes* had influenced his thinking. Lilburne became a well-known jailhouse common lawyer:

> Called to the bar at Newgate [Prison], where he now practiseth, [he] hath the Book of Statutes there lying open before him, which he reads and interprets to all the poor ignorant people that visit him . . . "In the Petition of Right . . . " observed Lilburne, "the true meaning of Magna Carta

[712] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 272 (1968).
[713] *Id.*
[714] CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 23–24 (1998).

> had been laid bare . . . it is declared to be contrary to [Common] Law, to force a man to answer Questions [sic] concerning himself, or for refusal, to commit him to prison."[715]

At length, Oliver Cromwell by letter written, persuaded Parliament to free Lilburne. Cromwell argued that to censure an officer (Lilburne) for his opinion in point of conscience by keeping him jailed discouraged the army because the rights Lilburne insisted Parliament observe were those for which the parliamentary forces had risked their lives. "[It was] for the liberty whereof," wrote Cromwell, "and to free themselves from the shackles in which the bishops would enslave them, that the army had been principally raised."[716]

Respecting the right to remain silent, Gibb identifies Puritans with common lawyers, "Puritans and common lawyers had convinced themselves that, as a matter of conscience and fairness, an oath that compelled self-incrimination was both evil and violative of common law . . . ."[717] In the House of Commons, Peard argued for observance of the common law under the direction of Scripture, "Let no accusation stand," said Peard, "except under the mouths of two or three witnesses . . . ."[718]

§ 3.7.11
The Westminster Confession & Magna Carta

Assembling at the summons of Parliament in 1643, more than 100 years after the Reformation had begun, the men of the Westminster Assembly worked in the light of knowledge gained through the unrelenting experience of more than a century of the refining fires of persecution. They thus succinctly expressed applicable biblical truth during a time of keen understanding sharpened by adversity of the deepest convictions.

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[715] M.B. GIBB, JOHN LILBURNE: THE LEVELLER 130 (1947), *quoted in* LEVY, *supra* note 712, at 290 (archaic spelling in original). Both of these common-law standards have suffered in American courts. Courts in America do incarcerate individuals under contempt for refusal to answer questions if the court feels, in its imperious pleasure that the witness is not in real prosecutorial danger. The burden remains upon the one asserting the right to remain silent to prove he is in real (legally cognizable) accusatory danger. To meet this burden, however, the accused must reveal the very information he desires to keep to himself.

[716] LEVY, *supra* note 712, at 291–92.

[717] *Id.* at 280.

[718] *Id.* at 280–81. See generally 1 *Corinthians* 13:1, for reiteration that Scripture requires a plurality of witnesses—i.e., at least two but no more than three—to establish every material matter (relevant fact) pertaining to a trial.

Magna Carta and the Westminster Confession are alike in at least four respects: both arose out of conflict fomented by the Crown claiming absolute royal right against law; both were drafted by churchmen of biblical faith; both were a repudiation of Roman doctrines of religion, law, and government; and the power of Rome held both in disdain and their drafters in contempt, excommunicating them as cursed. The two documents differ in that Magna Carta is the nobility's statement of law against the claims of the Crown, whereas the Westminster Confession is the Commons statement of law against the claims of not only the Crown but also the nobility.

Parliament convened the Westminster Assembly during the war between Charles I. and Parliament, pursuant to the common-law principle of limited government by advice and consent, to provide advice and guidance to Parliament concerning unity between England and Scotland that was agreeable to God's Word. Therefore, the times and circumstances had honed the issues the men at Westminster considered as near keen as was possible. The Westminster Assembly of 1643 felt the near and direct heat of trial by battle then raging over the same disagreement resolved in the meeting of 1215 at Runnymead: the common-law principle of limited government verses the civil-law notion of an absolute monarchy. The men of the assembly at Westminster, however, included representatives of both England and Scotland. Moreover, though the issues Magna Carta addressed were some of the same fundamental disputes the Westminster Confession addressed, Magna Carta was largely an agreement of practical due process, whereas the Westminster Confession is practical advice, with scriptural reasons given for that advice.

At the core Reformation in England was the conflict between God's Word and the *Code of Justinian*. This conflict played out in the clash between common-law courts' due process and civil-law tribunals' inquisition; between individual responsibility to exercise independent judgment according to one's conscience and the absolute state as lord of the individual's conscience.

Because the times in which the men of the Westminster Assembly lived had excited a heightened awareness of both the Scripture and the common-law tradition, imbibing this enlivened atmosphere was unavoidable. Consequently, the men at Westminster pondered common-law ideals in the light of Scripture:

> The Assembly consisted of 121 divines with ten lords and twenty commoners as assessors with equal debating and

> voting rights . . . The Assembly was not a church court, and possessed no ecclesiastical authority. It was simply a council summoned by Parliament to give advice and guidance to the civil authorities for the promotion of unity and uniformity in the work of the Reformation.[719]

To discern one's fitting duty, one must order one's thinking with Scripture. One's gathering of knowledge (truth) or supposed knowledge (falsehoods) makes up one's conscience. The rightness of one's conscience, therefore, depends upon whether it is rightly informed. Thus, Christian conscience requires three things: right knowledge, ordered thinking about that knowledge, and the Holy Spirit's impelling motivation to accept and follow the sound conclusions necessarily proceeding from that knowledge.

Understanding that each person must follow his conscience as God gives the light, the men at Westminster wrote, "God alone is Lord of the conscience, and has left it free from the doctrines and commandments of men, which are, in any thing, contrary to His Word."[720] Upon this scriptural truth, the common-law tradition stands. The common law binds each individual in loyalty to the majesty of law (producing law keeping and dignity among men) and not to the weakness of men (resulting in lawlessness and indignity with the few dominating the many), known as the state. The foregoing sentence from section 20 is the most quoted sentence of the *Westminster Confession*.[721]

The common-law tradition protects freedom of individual conscience; each person will ultimately answer to God for all that he has thought and done. The civil-law tradition ignores freedom of individual conscience, unless one's conscience clashes with the will of the state; in which case, the state will force that person to answer for his opinions that are contrary to the state's. For example, Rome's empire permitted each individual to worship as he saw fit, so long as he paid homage to the state as incorporated in the person of the emperor. You may worship according to your conscience and loyalties, said Rome, so long as you exhibit ultimate loyalty to the state's command. Such demand of the state

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[719] Adam Loughbridge, *Westminster Assembly, in* DICTIONARY OF THE CHRISTIAN CHURCH 1039 (J.D. Douglas ed., 1978). *See in addition* B.B. WARFIELD, THE WESTMINSTER ASSEMBLY AND ITS WORK (1931).

[720] *Westminster Confession of Faith*, ch. 20, sec. II.

[721] The *Confession's* efficiency of words is due to its having arisen out of intense struggle that sharpened its expression of precepts. The men at Westminster rendered the *Confession* out of real cases and controversies that had continued in struggle for over nine decades. In few places outside of Scripture do such few words elucidate such weighty matters.

persists wherever a nation's tradition claims total jurisdiction for its law and government.

§ 3.7.12
The Great Writ:
Habeas Corpus

Indispensable to the civil law's devices of inquisition is the power of the state to hold the target of its investigation under arrest in order to wear him down, discourage him, and subdue him into conformity with the will of the state. Imprisonment of potential witnesses and suspects for long periods under deplorable conditions can break their will and gain their compliance.[722] In 1679, in response to such practices, Parliament passed the Habeas Corpus Act,[723] forbidding the king from arbitrarily locking up those of whom he disapproved and, at the petition of the one locked up, answering in open court for the lawfulness of his actions. At the demand

[722] The Writ of habeas corpus is applicable against not only the government, but also against any one holding another falsely. For example, the Writ can run against a parent or other family member in false custody of a child, whether mistake of misunderstanding or by willful intent, i.e., kidnapping. The Writ can also run against a hospital for holding one wrongly deemed insane.

[723] The Habeas Corpus Act (31 Car. 2, 1679) is one of the four great charters of English liberty, now part of our federal Constitution. *See* U.S. CONST. art. I, § 9, cl. 2. The other three are Magna Carta (1215), the English Petition of Right (3 Car. I, 1628), and the English Bill of Rights (1 Wm. & M. 1689). One rightly adds to this list the United States Constitution because its function was, and is, fundamentally identical with the foregoing four: i.e., to *re*-affirm and sustain neglected common-law rights by limiting government.

The Habeas Corpus Act secures speedy relief from unlawful imprisonment; "perhaps the most important writ known to the Constitutional law of England." CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 53, at 350 (5th ed. 1994). This writ is again in the forefront as the federal government hesitates to recognize this right concerning Iraqi prisoners. The Writ of habeas corpus stands as an available guard against the state's abuse of power; as state power multiplies, this ancient Writ becomes more, not less, important. One ought always remember that war begets state power. Put another way, war begets powerful kings; powerful kings beget more war. Thus, history testifies, even in the brief life of the United States.

For example, at the outbreak of America's war between the Northern and Southern States (1861–1865), the federal government employed about 6000 people. At the close of the war, four years later, the number had escalated to almost 60,000 and has been multiplying beyond proportion to our population ever since. In the United States, government justifies multiplication of employees using pleas of necessity; in most all cases, more employees places power in the hands of the executive; the legislative and judicial branches having little need and even less excuse to do so. Increasing the number of government employees, therefore, magnifies the executive's power—and his temptation to exercise it—in disproportion to the other two so-called coequal branches of government, and to the private sector. The Writ of habeas corpus is a remedy against executive power available only in common-law countries. Even Scotland, though part of the United Kingdom, being under civil law, does not enjoy the Writ's protections.

of the prisoner, the government must give lawful reason for the imprisonment and proof that the imprisoning power has followed due process. Parliament's Act granted no new right, but provided procedure enabling better realization of the ancient right.

With passage of the Habeas Corpus Act came a certain process. Upon petition of a jailed party claiming false imprisonment, the court will issue the Great Writ to the jailor, commanding that he make return on the Writ of the prisoner's body (corpus) before the court and that he satisfy the court that the imprisonment is lawful. If the jailing power fails to meet this burden, the court will order release of the prisoner forthwith. If, however, the jailing power ignores the court's Writ, the court will order the sheriff, or its marshals or bailiffs, to arrest the one refusing to make return on the court's order, and to jail him for contempt until he agrees to obey the Writ.

Only in extra ordinary circumstances does the Constitution allow suspension of the Writ of habeas corpus. The common-law tradition recognizes this Writ as the first and greatest protection of personal freedom, having existed at common law long before Parliament or any American legislature confirmed it by statute:

> The writ of habeas corpus, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity.[724] After a checkered career in which it [the writ of habeas corpus] was involved in the *struggles between the common-law courts and the courts of Chancery and the Star Chamber*,[725] as well as in the conflicts between Parliament and the Crown, the protection of the writ was firmly written into English law.[726]

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[724] The phrase *immemorial antiquity* and its ancestor *time out of memorie* are legal terms of art bearing strict meaning at common law: the time before the accession of Richard I. to the throne on 23 September 1189. This is not the date common law began, but marks a technical statute of limitations—"capricious as all such statutes must be"—back of which the common law will not look for precise authority. 1 FREDERIC WILLIAM MAITLAND, *Why the History of English Law is not Written*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 30 (1911).

[725] The Star Chamber and Chancery were both civil-law tribunals. Parliament has abolished the Star Chamber Court. Though the Courts of Chancery persisted into America, common-law first principles such as *stare decisis* now govern Chancery jurisdiction; but the Jury are still never used.

[726] CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 53, at 350 (5th ed. 1994) (emphasis added).

The Writ of habeas corpus can disable inquisition and, thus, is unknown in civil-law states. In common-law countries, on the other hand, one enjoys the right to challenge false imprisonment—violation of the right of bodily freedom of movement—by petitioning the court to issue the Writ of habeas corpus to the jailer, ordering him to bring the petitioner before the court and to prove a lawful reason for his imprisonment. The Writ, therefore, provides a remedy enabling a jailed person to challenge not only the legality of his imprisonment but also the lawlessness of the state's agents.

The Writ is of immemorial antiquity and was a powerful weapon against the civil law's Star Chamber[727] court of the Tudor monarchs. It remains the weightiest Writ known to our common-law freedoms.[728] By this Writ, an imprisoned man has power to make his appeal before a magistrate that is detached, separate, and independent of the executive and legislative power. The Writ of habeas corpus, by removing the state's power of intimidation through arbitrary imprisonment of undefined duration, strikes at the heart of tyranny.

§ 3.7.12.1
The Great Writ
in England & America:
—A Case Study—

The Great Writ in England

The case of James Sommersett shows how, in a common-law country, a court finding can bring about legislative acts and even lead other nations. Consider the facts of the Sommersett case. In 1772, James Sommersett, a slave from the Colony of Virginia, sailed with his master from Virginia, a territory sanctioning slavery, to England. Upon arrival, Sommersett absconded, was then caught, and imprisoned. Concerned persons then made application to the court on behalf of Sommersett for the Writ of habeas corpus; the Writ issued and, in obedience to the Writ, the jailor

[727] See generally § 5.1.5 of this book (discussing the civil law's inquisitional character); § 3.8 of this book (discussing the Star Chamber Court).

[728] Fashioned from England's Habeas Corpus Act of 1679, the Writ of habeas corpus is a constitutional guarantee of speedy relief from unlawful imprisonment in common-law countries such as England and the United States. In 1798, Thomas Jefferson wrote to A. H. Rowan, "The Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume."

made return on the Writ and brought James Sommersett, the Virginia slave, before the court.

Lord Mansfield stated in his prejudgment remarks that no precedent is found in the common law for slavery on English soil, regardless of whether Sommersett was "a slave according to American law . . . We cannot at any of these points direct the law; the law must rule us . . . ." Mansfield then found, "The state of slavery . . . is so odious, that nothing can be suffered to support it, but positive law." Finding nothing in judicial precedent (the common law) or the acts of Parliament (positive law) recognizing slavery on English soil, the court discharged James Sommersett and declared him free.[729]

Commenced as a habeas corpus proceeding, the *Sommersett* court found no sanction for slavery in common-law court opinions or in positive law by legislation of Parliament. The Court held, therefore, that because English law has never recognized slavery, the court is without authority to recognize it. Thus, on English soil, lawful exercise of any claimed rights of slavery over another person, the court concluded, is impossible.

Though it is said that *Sommersett* never abolished slavery on English soil as a legal matter—it is impossible to abolish the lawfulness of that which has never been lawful—, *Sommersett* spelled the end of slavery on English soil, in law as well as fact: in response to *Sommerett*, Englishmen turned free between 14,000 and 15,000 slaves.[730] From these figures, it is reasonable to conclude that thousands of Englishmen knew that the *Sommersett* finding ended slavery indeed. From the Court's opinion and the response of slave-holding Englishmen, no other conclusion is reasonable.

Thus, both Parliament's legislation of 1807 (prohibiting British subjects from participating in the slave trade) and its legislation of 1834 (prohibiting slavery), instead of ending slavery, rather declared England's support of *Sommersett*. As the Habeas Corpus Act, these acts of Parliament, "nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation.[731] Following *Sommersett*, the English called England *free soil*,

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[729] *See generally* HEWARD, *supra* note 386, at 139–49 (recounting the history of the common law's intolerance of slavery on English soil, English inconsistency with the common law on this point, and the English courts' vindication of the common-law standard against slavery).

[730] *See* HEWARD, *supra* note 386, at 147.

[731] *Ex parte* Merryman 17 F. Cas. 144 (1861).

the phrase Americans in the United States later used for the name of the short-lived Free Soil Party (1848–1852) and during the debates over whether to admit new states into Union as free-soil states or slave states.

The Great Writ in America

The case of James Sommersett, as a matter of judicial precedent, was powerful also in the United States. Upon becoming president, Abraham Lincoln was well acquainted with the Writ of habeas corpus. The federal court's service of this Writ upon the office of President Lincoln still offers guidance for its use. Lincoln's experience with the Writ as a circuit-riding frontier lawyer, and later as President, provides an informative case study of the continuity of English and American common law, and of the American experience with the Great Writ as a common-law remedy against civil-law infringements of fundamental rights.

A few years ago, the writer was searching files for his client in the court clerk's office of the Coles County, Illinois courthouse. Another researcher, there at that time, showed to the writer a court order he had uncovered from the files, ordering discharge from the sheriff's custody of five former slaves, following the Coles County Court's issue of the Writ of habeas corpus. The order showed that in this proceeding, Robert Matson had asked the Sheriff to find, arrest, and hold his runaway slaves until he claimed them as his property.[732] Abraham Lincoln represented Matson.

At that time, Matson owned a plantation in Bourbon County Kentucky. Each spring, however, he and a few of his slaves crossed over into Illinois to work a farm he had purchased above the Shelbyville Moraine in Coles County, where the dirt is exceedingly black and rich. After harvest in Coles County each fall, Matson and his slaves returned to their domicile in Kentucky. While absent from his Coles County farm, however, Matson employed one of his former slaves, Anthony Bryant, as a permanent resident, watchman, and overseer on his Illinois farm. Because Bryant was a domiciliary of Coles County, as a matter of Illinois law he was a freeman. Bryant's wife Jane, however, was only a temporary resident on the Illinois farm each year—from planting to harvest—, with intent to return to her home in Kentucky, come fall of each year. Therefore, many believed she remained a slave in the eyes of Illinois law;

[732] *See In the Matter of* the Petition of Jane Bryant, Mary Jane Bryant, Mary Katherine Bryant, Sally Ann Bryant, and Robert Noah Bryant—Persons of Color, on application of "*Habeas Corpus*" for freedom, Coles County, Illinois Cir. Clerk Records for Oct. Term 1847, p. 191, bk. 2 (lower-case letters in original).

while others, resting on the English case of James Sommersett, believed she was free. Illinois, they said, was as England: free soil.

While in Coles County during harvest one year, Jane fell into an argument with Matson's housekeeper, who threatened to urge Matson to ship Jane back to Kentucky, or perhaps sell her deeper South. Fearful of the housekeeper's sway over Matson, Jane's Bryant's husband Anthony Bryant, found refuge for his wife, their three daughters, and their son with a local innkeeper, a few miles east of Charleston, Gidion Ashmore.[733]

Matson, having learned that Ashmore had given his slaves refuge, appealed to Ashmore to return Jane Bryant and her children to his farm. Ashmore refused his request; Matson petitioned the Coles County Court and Sheriff for the return of Anthony Bryant's wife and children. Sheriff Lewis A. Hutchason responded, discovering Jane Bryant and her children hiding at the home of Dr. Hiram Rutherford, a sympathetic soul living eight miles north of Ashmore's Inn at the village of Oakland, Illinois. Hutchason arrested and jailed Jane and her four children at the county seat in Charleston and awaited further disposition of the Coles County Court.

Ashmore, believing Jane and her children were free as a matter of Illinois law, began an habeas corpus hearing on behalf of the Bryants in the Coles County Court. The Court granted the petition and issued the Writ ordering Sheriff Hutchason to produce Jane Bryant and her children before the Court and to show the Court a lawful cause for holding them in jail. The habeas corpus hearing now pending, Dr. Rutherford—the man having provided refuge for Jane and her children and a long-time friend of Abe Lincoln—sought Lincoln's services as a lawyer. Matson, however, had already discussed the matter with Lincoln. Lincoln, therefore, told Rutherford that professional ethics kept him from serving as Rutherford's counsel, unless Matson released him from confidence. Matson, however, refused; Lincoln, along with another lawyer named Linder—Lincoln's close friend but nonetheless political opponent—served as co-counsel for Matson.

By the time Sheriff Hutchason responded to the Writ and returned Jane and her children before the court, the case had garnered wide and keen interest. Two justices from the Illinois Supreme Court, Chief Justice Wilson and Associate Justice Treat, traveled to Coles County to sit as judges on the County Bench to consider the matter. Sheriff Hutchason, having now brought the Bryant family before the Court, the Court gave

[733] The Village of Ashmore, on the Coles County prairie, eight miles south of Oakland, is named for Gidion Ashmore.

hearing, heard arguments, and then ordered the release and perpetual freedom of Jane Bryant and her four children.[734]

The arguments of the lawyers and judges in the Matson case revealed their deft familiarity with the 1772 English case of the Virginia slave, James Sommersett, a case on point with the Matson case.[735] As James Sommersett was taken from a territory sanctioning slavery (Virginia) to a free jurisdiction (England); so also, Mary Matson and her children, were taken from a territory sanctioning slavery (Kentucky) to a free jurisdiction (Illinois). As did Sommersett, after arriving in free territory, the Matsons absconded, were then caught, and imprisoned. As the Sommersett case, concerned persons made application for the Writ of

[734] According to the Coles County Court records for the October Term of 1847, following Sheriff Hutchason's return on the Writ of habeas corpus, Illinois Supreme Court Chief Justice Wilson, assisted by Associate Justice the Samuel H. Treat, traveled down to Charleston to sit on the Coles County Bench, to hear the Application of Habeas Corpus for Freedom, and to rule on it. After hearing arguments, the Court issued the following order, dated 16 October 1847, in certification of freedom from slavery:

> Now at this day come the said applicants and presented by Gidion M. Ashmore their petition for the writ of *Habeas Corpus* directed to Lewis R. Hutchason, Esqr. Sheriff of Coles County who held them in custody and the court being satisfied in the premises, ordered the said writ to issue, returnable forthwith before his Honor Chief Justice Wilson assisted by the Honorable Samuel H. Treat, Associate Justice of the Supreme court [sic], and the said writ having been returned, and the said Lewis R. Hutchason having returned upon the said writ the causes of capture & detention with the said Negroes into court, and the cause coming on to be heard after testimony adduced and argument had and the court being satisfied what judgment to render herein, it is finally considered and adjudged that the said applicants Jane Bryant, Mary Jane Bryant, Mary Katherine Bryant, Sally Ann Bryant, and Robert Noah Bryant be discharged from the custody as well of the said Lewis R. Hutchason as of Robert Maston and all persons claiming them by, through or under him as slaves, and they be and remain free and discharged from all servitude whatsoever to any person or persons from henceforward and forever—It is further adjudged that this proceeding be certified to said negroes as evidence of their freedom, and the said Sheriff, Lewis R. Hutchason having returned that [sic] said negroes retained by him upon proceeding instituted by the said Robert Matson as owner of the said Negroes, [sic] It is further ordered and adjudged that the said Robert Matson pay all costs due and owing by reason of the original arrest of said Negroes including the costs of this application and that execution issue from this court etc.

Id. *See also generally* CHARLES H. COLEMAN, ABRAHAM LINCOLN AND COLES COUNTY ILLINOIS 107–09 (1955) (providing additional testimony concerning Lincoln's involvement in the Matson slave case). This case is all the more significant in that it occurred before the passage of the controversial Fugitive Slave Act that, in theory, preempted Illinois law granting freedom to slaves taking up permanent residency in Illinois. *See* U.S. CONST. art. VI, cl. 2

[735] See generally *supra* this § 3.7.12.1 (discussing the *Sommersett* slave case).

habeas corpus on behalf of the Matson, the Writ issued, and a return made on it.

Out on the frontier in the Coles County courthouse, before a room full of prairie farmers, the facts of the Matson case and the question it presented were akin to those having come before the Justices of the King's Bench seventy-five years before in the *Sommersett* case; the results were also the same. The English case of James Sommersett was precedent for the Illinois Matson case. Luthin picks up the account at the Coles County courthouse:

> [The] hearing on the writ of *habeas corpus* began in the Coles County Circuit Court at Charleston on October 16, 1847. No jury would decide it; only the judges, Wilson and Treat. In that emotionally charged courtroom, Ficklin and Charles H. Constable acted for the slaves. Ficklin argued that the Ordinance of 1787 and the state Constitution of Illinois conferred freedom upon former slaves. Constable gave forth a lengthy dissertation on Anglo-Saxon concepts of freedom. Linder, co-counsel with Lincoln for Matson, argued that every citizen must be protected in the protection of his property.[736]

According to opposing counsel and Lincoln's friend O.B. Ficklin, Charles Constable's closing argument was powerful and made Lincoln wince. Invoking the "spirit of the British law" in the Northwest Ordinance of 1787, Constable argued that Congress intended the soil of the Northwest Territories, now formed into states, to be as the soil of Britain: intolerant of anything less than freedom for all that touch it. Constable's argument echoed the common understanding of American lawyers and judges of that day, including Ficklin, Constable, Lincoln, and Linder, all knowing full-well Lord Mansfield's finding in *Sommersett* and the first edition of Blackstone's *Commentaries* concerning the legal impossibility of slavery in England. "The spirit of liberty," said Blackstone, "is so deeply planted in our constitution and rooted in our very soil that a slave or negro the very moment he lands in England falls under the protection of the laws and with regard to all natural rights becomes *eo instanti* a free man."[737] Constable's argument, supported by Ficklin's, carried the day:

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[736] REINHARD H. LUTHIN, THE REAL ABRAHAM LINCOLN 75 (1960).

[737] After *Sommersett*, Blackstone's *Commentaries* acknowledged the inconsistency of about 15,000 slaves held on English soil, where slavery was a legal impossibility. In subsequent editions, he added hedging language concerning any slave brought into

> I speak in the spirit of the British law, which makes liberty commensurate with and inseparable from British soil; which proclaims even to the stranger and sojourner the moment he sets foot upon British earth, that the ground upon which he treads is holy and consecrated by the genius of universal emancipation, no matter what complexion . . . ; no matter in what disastrous battle his liberty may have been cloven down; no matter with what solemnities he may have been devoted upon the alter of slavery; the first moment he touches the sacred soil of Britain the alter and the god sink together in the dust; his soul walks abroad in her own majesty; his body swells beyond the measure of his chains that burst from round him and he stands regenerated and disenthralled by the irresistible genius of universal emancipation. [738]

Because his anti-slavery sympathies were well known, all eyes in the crowded courtroom rested on Abraham Lincoln as he arose to make his closing argument for Matson. Duncan T. McIntyre, member of the Coles County Bar, admired Lincoln's argument, but it struck him strange:

> [S]trange to say, he did not once touch upon the question of the right of Matson to take the negroes back to Kentucky. His main contention was that the question of the right of the negroes could only be determined by a regular *habeas corpus* proceeding, and not by a mere motion, as was then attempted. His argument was masterful in that he was . . . adroitly shunning the vital question at issue in the case.[739]

According to those in the courtroom that day, Lincoln weakly argued that the controlling question was whether the slaves were *in transitu* or meant to remain permanently in Illinois on Matson's farm.[740] "All

England: "[A] master's right to his services may probably (or possibly) still continue."

[738] CHARLES H. COLEMAN, ABRAHAM LINCOLN AND COLES COUNTY ILLINOIS 107 (1955). "[O]ne may be a villein in England," said Sir John Holt, "but not a slave." Smith v. Brown and Cooper, 2 Salkeld 666.

[739] DUNCAN T. MCINTYRE, *Lincoln and the Matson Slave Case*, ILL. L. REV. (1906).

[740] 1 ALBERT J. BEVERIDGE, ABRAHAM LINCOLN, 1809–1858 396 (1928). The sources provide difference of opinion regarding what Lincoln argued to be the controlling question. According to McIntyre, Lincoln's controlling complaint was procedural: Lincoln argued that the facts demanded a regular habeas corpus proceeding instead of a mere motion. According to Beveridge, Lincoln's controlling complaint was substantive: Lincoln argued that the controlling fact was whether the Bryants' permanent home was Illinois or

thought that Lincoln's speech was fatal to his client. Seemingly Lincoln thought so too."[741] On the habeas corpus hearing, Justices Wilson and Treat found and ordered that the slaves shall "be and remain free and discharged from all servitude whatever to any person or persons from henceforward and forever."[742]

Dr. Hiram Rutherford reported that following the announcement of the court's decision, straight away, Matson ran from the courthouse, high-tailed southeast, crossed the Wabash headed for Bourbon County Kentucky, evaded his creditors, and never paid Lincoln his fee. The following morning Lincoln ate a good breakfast, threw his saddlebags over the flanks of his gray mare, and rode south across the Ambraw (spelt *Embarras*)[743] River for the Cumberland County courthouse, where court was to be open and lawyering business was to be had.[744]

§ 3.7.12.2
Suspension of the Great Writ
—A Case Study—

[T]he chief justice said that the marshal had the power to summon the posse comitatus to aid him in seizing and bringing before the court, the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command he held that officer excused from doing anything more than he had done.[745]

Kentucky. Doubtless, Lincoln argued both issues; indeed, it was his duty to do so. Likely, McIntyre, being a lawyer, saw the procedural issue, whereas Beveridge was sensitive to the substantive side of the case, calling it *vital*. That the Court observe proper procedure (due process), however, is just as vital as the substantive side of the case because to ignore proper procedure will deny substantive rights. Good procedure makes for a good outcome.

[741] *See id.*

[742] *See In the Matter of* the Petition of Jane Bryant, Mary Jane Bryant, Mary Katherine Bryant, Sally Ann Bryant, and Robert Noah Bryant—Persons of Color, on application of *Habeas Corpus* for freedom Coles County, Illinois Cir. Clerk Records for Oct. Term 1847, p. 191, bk. 2.

[743] *Ambraw* is the American attempt to approximate the pronunciation of the French name Embarras ("Ambara"), meaning to bar or block, as do logjams in that small river.

[744] 1 ALBERT J. BEVERIDGE, ABRAHAM LINCOLN, 1809–1858 397 (1928). Parts of the foregoing account are excerpted and edited *from Mr. Lincoln and Freedom*, a project of The Lincoln Institute *under a grant from* The Lehrman Institute (visited 1 *Nov.* 2006) <www.mrlincolnandfreedom>.

[745] Supreme Court Justice Taney, sitting as federal circuit judge, pondering the federal marshal's authority to call to order the unorganized militia to effect the Writ of habeas corpus against the United States Army. In *Ex Parte Milligan*, the Supreme Court found that the law allows suspension of Writ of habeas corpus only in specific localities, clearly identified and defined, where the chaos of war prevents state and national courts from

Due to Abe Lincoln's representation of Robert Matson in the Matson slave case, upon becoming President, Lincoln was no stranger to the Writ of habeas corpus,[746] and was to face an even greater issue concerning it. During the first year of the war, he suspended the Writ at least eight times and jailed over 850 persons without trial.[747] The best known of these imprisonments was that of John Merryman, secessionist and Maryland cavalry lieutenant. In Merryman's case, President Lincoln defied the federal circuit court's Writ of habeas corpus, demanding that Lincoln, by the military men under his orders, make return of Merryman before the court and show good authority for holding him. The Writ of habeas corpus is called *Great* because, among other reasons, it is one of

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being open and wherein martial law governs. Further, the Court found that where the courts are open, martial law has no jurisdiction, notwithstanding any military decrees to the contrary:

> It is essential to the safety of every government that, in a great crisis . . . there should be a power somewhere of suspending the writ of habeas corpus . . . The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed the [Constitution] . . . limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Ex Parte Milligan, 4 Wallace 2 (1866).

[746] See generally § 3.7.12.1 (discussing the Coles County, Illinois Matson slave case, wherein Lincoln argued against release of runaway slaves brought before the court on the Writ of habeas corpus).

[747] President Lincoln began his term with unprecedented suspensions of the Writ of habeas corpus:

> In dealing with military matters, Lincoln authorized the suspension of habeas corpus at least eight times from April 27, 1861 to December 2, 1861 . . . The suspension was first controlled by the Secretary of State and some 864 persons were imprisoned without trial during the first nine months of the War. The number of arrests greatly increased in 1862 when the Secretary of War was given the responsibility. Most of those imprisoned were smugglers, spies, blockade runners; few were political prisoners.

B.F. McClerren, "The Lincoln I Know." Presented to the Association of Lincoln Presenters (9 Apr. 2006) (transcript on file with author).

those few means where law empowers the federal judiciary to command the President and where law requires the President to obey.

As Gidion Ashmore had done for Jane Bryant and her four children in the Coles County Court, Merryman petitioned the federal court to issue the Writ of habeas corpus, directing federal army officers to bring Merryman before the court and show lawful reason for holding him in jail.[748] The court issued the Writ to Brigadier General George Cadwalader, commanding officer of Fort McHenry, where the Army held Merryman. President Lincoln, however, ordered General Cadwalader to disobey it. Receiving service of the Writ, General Cadwalader chose to disregard the order of the federal district court, and to obey President Lincoln's order to keep Merryman jailed. Upon weighing the totality of the circumstances, President Lincoln refused to withdraw his order to General Cadwalader, holding that, given the necessities of war, the Constitution empowered him to suspend (ignore) the Writ of habeas corpus.

Justice Taney of the United States Supreme Court, on the other hand, disagreed. Sitting as a federal circuit judge, Justice Taney, by written opinion, found that the Constitution authorized only Congress, never the President, to suspend the Writ of habeas corpus. Moreover, as long as the non-military courts were open and able to issue the Great Writ, wrote Justice Taney, the Constitution forbids suspension of the Writ. Notwithstanding, Justice Taney failed to persuade President Lincoln; President Lincoln refused to make Merryman's return before the court; Merryman remained jailed. Justice Taney, acknowledging the futility of sending the court's marshals and summoning the militia to enforce the

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[748] Chief Justice Taney issued the Writ of habeas corpus served on General Cadwalader:

> District of Maryland, to wit: The United States of America, to General George Cadwalader, Greeting: You are hereby commanded to be and appear before the Honorable Roger B. Taney, chief justice of the supreme court of the United States, at the United States courtroom, in the Masonic Hall, in the city of Baltimore, on Monday, the 27th day of May 1861, at eleven o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there, do, submit to, and receive whatsoever the said chief justice shall determine upon concerning you on his behalf, according to law, and have you then and there this writ. Witness, the Honorable R.B. Taney, chief justice of our supreme court, &c. Thomas Spicer, Clerk. Issued 26th May 1861.

Ex parte Merryman, 17 F. Cas. 144 (1861) (lack of capital letters in original).

Writ against the United States Army, let the Merryman matter end.[749] Though ignored by President Lincoln,[750] Justice Taney's words still provide a rule of law applicable as a measuring standard in deciding whether the law allows suspension of habeas corpus in times of war.

Throughout our history, whether concerning slavery, military, or other matters, the Writ of habeas corpus has been available and often asserted. Writing in 1833, long before the incident of Lieutenant Merryman, Justice Story had recognized that only Congress has the power to suspend the Writ of habeas corpus: "[N]o suspension of the writ has ever been authorized by congress since the establishment of the Constitution."[751]

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[749] President Lincoln never exhausted due process before acting. For example, he could have ordered General Cadwalader to produce Merryman before the Court, awaited the Court's decision and, in the event the President disagreed, issued his own opinion requesting the Court's reconsideration—all the while holding custody of Merryman if he thought best. Then, if the Court denied the President's request for reconsideration, he would have fulfilled his responsibility to due process and independent judgment in effecting his convictions under the Constitution.

[750] Conceding the facts as President Lincoln presents them, the language of the Constitution allows his construction of the Habeas Corpus Clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2 (capital letters in original). On the other hand, "Congress is the only power," says Mr. Justice Joseph Story, "that can authorize the suspension of the writ of habeas corpus." Chief Justice John Marshall agrees and William Blackstone, by denying the executive the power of suspension of the Writ of habeas corpus, agrees in principle.

"Necessity," said British Parliamentarian William Pitt, "is the plea for every infringement of human liberty: it is the argument of tyrants; it is the creed of slaves." If Congress finds that extra ordinary circumstances necessitate suspension of this great writ, any reviewing court must closely scrutinize the government's argument for suspension and tightly constrict any government action based on necessity. State necessity and administrative expediency are fundamental policies of civil law, not common law.

[751] STORY, *supra* note 89, at 483. *See also Ex parte* Merryman, 17 F. Cas. 144 (1861). Justice Taney held that under the Constitution of the United States, Congress is the only power with authority to suspend the Writ of habeas corpus. In support of his finding, Justice Taney quotes his predecessors on the Supreme Court: Justice Joseph Story and Justice John Marshall. For example, Justice Story once wrote, "It would seem, as the power is given to Congress to suspend the writ of habeas corpus . . . that the right to judge whether the exigency had arisen must exclusively belong to that body." Taney also cites Chief Justice John Marshall's opinion that, if suspending the writ is necessary for public safety, only Congress has authority to do so. "I can add nothing," says Justice Taney, "to these clear and emphatic words of my great predecessor."

In further support his position, Justice Taney appeals to the English common law and quotes Judge William Blackstone, "[T]he happiness of our [English] constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient." Although Justice Taney concedes that the English and American governments differ, he reminds readers, "[U]pon this subject they [English judges] are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice." *Id.*

Keeping freedom demands watchfulness. The legal labels and persons concerned will vary as the decades and centuries roll on, but the fundamental issues, concerning the ancient remedies for violations of God-given dignities stay constant. This right of the great common-law Writ of habeas corpus applies to Americans and non-Americans alike. The habeas corpus Writ, said Thomas Jefferson, secures every man here, whether alien or citizen, against everything that is not law, whatever shape it assumes. The Constitution's Habeas Corpus Clause[752] is understood aright only in the light of the common law and applies in every geographic place the United States chooses to act:

> In order to understand the meaning of the terms used here [the Constitution's Habeas Corpus Clause], it will be necessary to have recourse to the common law; for in no other way can we arrive at the true definition of the writs of habeas corpus . . . It is justly esteemed the bulwark of personal liberty . . . applied in every case of illegal restraint, what ever it may be; for every restraint upon a man's liberty is, in the eyes of the law, an imprisonment, *wherever may be the place*, or whatever may be the manner, in which the restraint is effected."[753]

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[752] *See* U.S. CONST. art. I, § 9, cl. 2. In February of 1745, upon hearing of the anticipated uprising of Prince Charles in Scotland, Lord Mansfield (William Murray), as Member of Parliament, supported the bill to suspend the Habeas Corpus Act. Lord Mansfield's actions as a parliamentarian respecting suspension of habeas corpus are consonant with Blackstone and Justices Marshall, Story, and Taney. As Parliament intended its Habeas Corpus Act to affirm and better enforce the Great Writ of the common law, the Framers, by including in the Constitution the provision forbidding its suspension, except in extraordinary cases, acknowledged the right of Great Writ. This provision of the Constitution, however, remains unsettled, especially in its application during hostilities against the United States.

[753] STORY, *supra* note 89, at 482–83 (emphasis added). The Writ of habeas corpus deserves our attention and understanding for the following reasons:

> The right of the subject to the benefit of the writ of *habeas corpus,* it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions . . . [F]rom the earliest history of the common law, if a person was imprisoned—no matter by what authority—he had a right to the writ of *habeas corpus,* to bring his case before the King's Bench, and, if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character the court was bound to set him at liberty on bail. And the most exciting contests between the Crown and the people of England from the time of *Magna Charta* were in relation to the privilege of this writ, and they continued until the passage of the statute of 31st Charles 2d, commonly known as the great habeas corpus act . . . It nevertheless conferred no new right

§ 3.8
Roman Civil Law
in Common-Law England

Equity, the law as to misdemeanors made in the Star Chamber, the law merchant, admiralty, the law as to probate and divorce made in the ecclesiastical courts, and the statutes of the nineteenth-century legislative reform movement in England and the United States, have been, as it were, digested and assimilated . . . [T]he common law made them over . . . their alien characters have steadily disappeared . . . they show few points of difference from pure common-law pedigree.[754]

William I., by affirming the common law—then called the *Laws of Edward the Confessor*—also affirmed the common-law courts. Along with the common-law courts, however, four civil-law tribunals operated in medieval England: ecclesiastic, chancery, admiralty, and chivalry. Later, for a time, the Crown used two additional civil-law prerogative tribunals: the Star Chamber and the High Commission.

Rome's ecclesiastic courts had been in England since at least the seventh century, when much—but never all—of the church in Britain subjected itself to the bishop of Rome; by so doing, she also subjected herself to the civil-canon law of Rome's ecclesiastic courts.[755]

The ecclesiastic courts claimed jurisdiction over the custody of children, probate of wills, and administration of estates of personalty (property other than realty). In England, the loyalty of the judges in the common-law courts was to the common law; the loyalty of judges in the ecclesiastic tribunals—being Roman priests—was to the bishop of Rome. Thus, the judges of the two traditions, confessing conflicting loyalties, competed for jurisdictional territory. The hostility between the English common-law courts and the Roman Church courts festered, erupted in violence from time to time, and became the focus of the clash between the common-law and civil-law traditions in England.

> upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation.

Ex parte Merryman 17 F. Cas. 144 (1861).

[754] ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 5 (1921).

[755] *See generally* 1 D'AUBIGNÉ, *supra* note 19, at 44–58 (recounting the Roman emissaries' seduction of Britain in general), 47–49 (recounting the crucial debate at Whitby before the British King Oswiu, between Rome's agent Wilfrid and the Scotsman, Coleman).

The heart and soul of the common-law tradition is individual rights arising from personal relationships; thus, the courts are the heartbeat of the common law. As long as the common-law courts were open, the common law stayed alive. Moreover, the Jury stayed intact, requiring *the powers that be* (the powerful parties in any given case) to seek its leave to act against the life, liberty, or property of another. In a word, for the civil law to displace the common-law tradition, it had to displace the common-law courts with something appearing comparable, i.e., its civil-law tribunals. [756]

The ecclesiastic courts, being civil-law tribunals, arrogated the source of power and the concentration of power's exercise to the legislator (the pope) before whom the ecclesiastic judges fawned. Common law and government, on the other hand, recognized an allocation of authority and power among an independent judiciary of independent jurors and judges, an independent executive, and an independent legislature. Because the expression of common law and government arises foremost from its courts, the rival civil law used Rome's ecclesiastic courts to usurp jurisdiction from the common-law courts, hoping to subject all judicial decisions to civil law's ecclesiastic code, the canon law.[757] Following the

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[756] By contrast, civil-law tribunals are dispensable to the civil-law tradition. In fact, the civil-law tradition sees courts and judges as an irritation at best and dangerous to the state at worst, but useful if kept in the state's control. Consequently, the civil law demands that judges become be *yes men* for the state by enforcing its legislative commands and conducting its inquisitions.

[757] The struggle for jurisdiction between the common-law courts and ecclesiastic courts set the stage for the English Reformation of church and government and the subsequent struggles from which the United States emerged as a separate country. Encroaching civil-law doctrines and devices in both church and state of England hampered freedom of conscience, association, speech, and worship and drove settlers to the Americas. The mother country's foisting of additional civil-law notions upon the American Colonies through a general denial of the common law's jurisdiction in the Colonies and the use of admiralty jurisdiction to effect that denial, at length, incited the Colonials' resistance and permanent break from England.

Blackstone's conclusion in his *Commentaries on the Common Law* indicates the dominant view of the English Bar concerning the non-applicability of the common law in the American Colonies and reveals the fundamental reason for the American Declaration of Independence. "[T]he common law of England, as such," writes Blackstone, "has no allowance or authority there [in the American Colonies] . . . ." STORY, *supra* note 89, at 64, *quoting* 1 BLACKSTONE, *supra* note 12, at 105. Justice Story calls Blackstone's statement "manifestly erroneous." *Id.* See generally § 3.10.4 of this book (discussing the enduring popularity of Blackstone's *Commentaries* in the American Colonies).

By denying the American Colonies the application and resulting benefits of the common law, Parliament justified its expanded use of admiralty jurisdiction to deny the Colonists' right to trial by jury, and, using admiralty jurisdiction's writs of assistance, their freedom from general searches and seizures. However, Blackstone's remarks concerning English law in the American plantations, taken together, disallow any clear inference of his view concerning admiralty jurisdiction in the American Colonies. *See id.* at 104–05.

English Reformation of church and government, the English Church kept its ecclesiastic courts separate from the common-law courts. The common law, invigorated by the rivalry, extended its methods of due process over the subject matter of the ecclesiastic courts. Consequently, though the ecclesiastic courts of England empanel no juries, they now observe common-law due process and *stare decisis*.

Chancery jurisdiction grew out of the ecclesiastic courts. In past centuries, common lawyers called chancery courts *courts of chance* because judges enjoyed the arbitrary license characteristic of civil law. The courts of chancery in England—and in the United States—inherited the jurisdiction of the ecclesiastic courts over marital matters, custody of children, probate of wills, and administration of estates of personalty, which call up doctrines of equity, such as injunctive relief in family matters and specific performance in contract cases.

In recent times, and especially in the United States, the common-law and chancery jurisdictions are no longer in separate courts, the states having included both jurisdictions in the courts of law. Thus, when a court hears a common-law matter such as contract or tort, lawyers say that the court is sitting in law; when this same court considers a chancery matter, such as injunctive relief or adoption, lawyers say that the court is sitting in equity.[758] Though courts sitting in equity (i.e., judging matters subject to chancery) still enjoy a wider discretion than do courts sitting in law (i.e., judging matters subject to common law), common-law

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The American Declaration of Independence reveals the outworking of Blackstone's conclusion—through the King and the other components of Parliament—that the common law is inapplicable in the American Colonies:

> He [the King] has combined with others to subject us to a Jurisdiction foreign to our Constitution and unacknowledged by our Laws; giving his assent to their pretended acts of legislation . . . For depriving us, in many Cases, of the benefits of trial by Jury . . . For abolishing the free system of English Laws in a neighboring province, establishing therein an arbitrary Government and enlarging its Boundaries so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies . . . ."

THE DECLARATION OF INDEPENDENCE paras. 15, 20, 22 (U.S. 1776). The aversion of the Rhode Island Colony to civil-law doctrine was strong enough to enable her to conduct her Vice-Admiralty Court with the Jury. Thus, judgments against merchants were rare. *See* STEVEN B. PRESSER AND JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 57 (1989).

[758] See generally § 3.9.6 of this book (discussing chancery jurisdiction and equity). Now that American courts include both jurisdictions in one court, says lawyer Lewis Stanton Dotson, the judge must keep both ears open for law and one ear also open for equity.

fundamentals of case precedent (*stare decisis*) and due process serve, nevertheless, to delimit the court's discretion.

Admiralty and chivalry courts in England also used the civil law. Admiralty courts held jurisdiction over ships at sea and other maritime affairs; chivalry courts held jurisdiction over military law and courts-martial. Civil law is suited to these two arenas of activity because both necessitate instant obedience to orders, coupled with swift and sure discipline for disobedience.[759] Both shipping upon the high seas and acts of war put men and nations in great risk. The stakes are high and lack of sure obedience can be unforgiving, both in immediate danger to life and limb, and in long-term losses of men and nations.

Two other civil-law tribunals of note, working hand-in-hand and sharing canon lawyers for judges, intermittently reared their heads in notorious defiance of the common law in England: the Star Chamber and the High Commission. Known as royal-prerogative courts, the Star Chamber "dealt with offences against public order; and the High Commission . . . was set up to enforce the religious settlement of 1559."[760] The High Commission dealt with regulatory matters and referred cases and findings to the Star Chamber for criminal prosecution. To stand before the High Commission, therefore, was to be in danger of the Star Chamber.

The High Commission was an ecclesiastic court charged with investigating offences against the Act of Supremacy (Parliament's delivery to the Crown of supreme and final power over the Church in England) and the Act of Uniformity (requiring uniform methods of worship throughout England). In the spirit of the civil law, these two statutes spoke in open-ended language meant to confer unlimited jurisdiction over the individual conscience, freedom of speech, freedom of the press, freedom of association, and any lawyers advising their clients to claim these fundamental rights.[761]

For example, the Statutes claimed to grant jurisdiction over "heretical opinions, seditious books, contempts, conspiracies, false rumors or talk, slanderous words or sayings, etc., contrary to the aforesaid laws, or any others ordained for the maintenance of religion in this realm, together

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[759] The common-law tradition, however, conditions obedience to orders upon the lawfulness of those orders; American military and admiralty law remain subject to this common-law fundamental. See generally § 4.6 of this book (discussing the duty of the individual, when the state commands that which is unlawful).

[760] BOBRICK, *supra* note 316, at 177.

[761] Still today, for a lawyer in the United States to advise his client to claim the Fifth Amendment against the wants of a federal prosecutor, is to risk federal Grand Jury indictment. This the writer testifies from experience and observation.

with their abettors, counselors, or coadjutors."[762] The High Commission, with its forced oath (called the oath ex officio[763]) and thirst to obtain self incrimination of its targets, coupled with the Star Chamber Court, more than any other atrocity, incited enough moral outrage to bear out and confirm the common-law right to remain silent[764] as a right co-extensive with the right to free speech.

At bottom, the Star Chamber[765] was the Crown's private inquisitional tribunal, submitting to neither halter nor bit of common-law due process. Being inquisitorial, its judges followed civil-law devices of inquisition and were, therefore, prosecutors as well. Further, the Star Chamber Court disallowed the Jury, forbade defense counsel for the accused, kept secret its sources of information—thereby preventing one's confrontation of one's accusers—, acted on secret information, and kept its proceedings secret. Deceit was its rule; confession and conspiracy were its darlings; torture and death (and threat of the same) were its ready tools.

Nevertheless, by many contests in the individual mind, in the courts, and on the field of battle, the common-law tradition gained preëminence in England. This struggle between the ways of the common-law courts and the devices of civil-law tribunals, says Winston Churchill, continued unabated from the war in England between the Crown and the forces of

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[762] *Id.* at 178, *quoting* 5 ENCYCLAEOPEDIA BRITANNICA 914 (n.d.).

[763] *See generally* LEVY, *supra* note 712, at 21 (1968) (providing examples the oath ex officio and England's reaction to its use).

[764] *See* U.S. CONST. amend. V.

[765] Some have held that the Star Chamber was so-called because its ceiling was painted in Babylonian fashion with stars—in the West, folk tend to decorate walls; but in the Middle East, folk tend to decorate ceilings. Nonetheless, William Blackstone conjectured that the name "*Star* Chamber" followed an aberration of the Hebrew word *sh'tar*, meaning "a written covenant or contract." Blackstone's view is reasonable:

> [B]efore the banishment of the Jews under Edward I, their contracts were denominated in our ancient records *starra* . . . from a corruption of the Hebrew word, *shetár*, a covenant . . . These starrs were commanded to be deposited in chests in the king's exchequer [where the king's tax accounts were kept] at Westminster . . . [This] room . . . was probably called the *starr-chamber*, and, . . . was applied to the use of the king's council, when sitting in their judicial capacity.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263 (photo reprint, n.d.) (1769), *quoted in* BLACK'S LAW DICTIONARY 1415 (7th ed. 1999). Blackstone was correct in understanding *sh'tar* (שטר) to be a contract recorded in writing (i.e., a promise enforceable in court). *Sh'tar* is a cognate of the Assyrian *sadhir*, meaning scribe or "writer." As a noun, it signified a scribe, magistrate, or a binding written instrument used to perfect a business transaction. The Star Chamber was the headquarters of the state's revenue (taxing) agency and became the room where the Crown's agents conducted inquisitions by inducing fear and by intimidation by, for example, threatening and decreeing torture.

Parliament, into the American colonial courts, and the American War of Independence.[766]

§ 3.8.1
Civil Law's
Divine Right of Kings

The people, for the first time in human history, trampled beneath their feet the doctrines preached by Pope and Bishop—the divine right of kings to rule.[767]

The history of England has ever been the struggle between two traditions of law and government: the common law, teaching that God dispenses authority, rights, and grace direct to the individual; and the civil law, demanding that grace, power, rights, and authority come to the individual only through the imperial Roman priests or through the emperor. By the time of the Protestant Reformation, men called the civil-law doctrine of the absolute state and ruler *the divine right of kings*. Sir Robert Filmer—claiming Scripture teaches that kings are divinely ordained fathers to their subjects, who owe to the monarch unflinching obedience—brought this doctrine to the forefront in England. Drawing notions from the imperial civil law, Filmer argued that freedom of the people is unnatural.[768]

From the earliest days of Babylon, the civil-law tradition has taught that God dispenses authority and grace only to the one in high office who, in his imperious pleasure, dispenses it to others. The Scriptures, however, declare that there is "one Mediator between God and men, the

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[766] Even though the particulars of civil law have advantage in certain defined contexts—such as equity jurisdiction, the military services, and ships in port and on the high seas—, it remains as important to keep the use of civil law subject to common-law controls, as it is to keep our military machine subject to and dependent upon non-military control. The Constitution requires that the President, as commander-in-chief, but a non-member of the armed forces, be in ultimate control of the armed forces of the United States. So also, the common-law first principles must control civil law's equity jurisdiction. Both requirements are indispensable checks on the dangers of civil law's abuses of power. The maxim of equity provides right order: "Equity [certain civil-law remedies] follows [common] law." In short, one can claim equity's civil-law remedies only where common-law offers no remedy. For example, the United States Supreme Court has held that military tribunals (civil-law courts) have no jurisdiction over non-members of the military forces as long as the courts are open and operating under common-law procedures and principles.

[767] CHARLES CARLETON COFFIN, SWEET LAND OF LIBERTY 213 (photo. reprint 1992) (1881).

[768] *See* SIR ROBERT FILMER, PATRIARCHA: A DEFENCE OF THE NATURAL POWER OF KINGS AGAINST THE UNNATURAL LIBERTY OF THE PEOPLE (1680), *discussed in* SIDNEY, *supra* note 451, at XVI–XVIII.

man Christ Jesus."[769] Differing with civilians such as Gaius, John Wyclif's writings followed Scripture, setting forth Christ as the only mediator between God and man, whether in church or government. Wyclif argued and urged that only Christ Jesus—no government, religious institution, or earthly leader of church or state—ever rightly stands between the individual believer and his God. By the power of his pen, Wyclif led Parliament in the struggle between the common-law and civil-law ideals, locked horns with the Roman priesthood, and identified the controlling issues for resolution in coming centuries. The king as any other, said Wyclif, has authority only as he acts within his God-given range of responsibility. Though each person owes respect to the king, he holds stewardship of his rights and property—whether a great landholder or holder only of small rights in personal possessions—*in chief* (immediate) to God, not to the king.

The civil-law phrase *divine right of kings* is but a new name for the old Babylonian doctrine also called *absolutism*. During the seventeenth and eighteenth centuries, political theorists lifted absolutism from the civil law, relabeled it, and scattered it abroad. It taught that all powers of government proceed from the state, embodied in one man. Thus, the civil law compounds all offices of government in a single will—whether called chief-of-state, king, emperor, prime minister, or president and whether of one man or a combination of men as lawgiver (legislative), interpreter of the law (judicial), and enforcer of the law (executive).

This theory empowers one man to decree the law, as does a bully who makes-up the rules of the game to suit himself as it goes along. In the event anyone has the fortitude to disagree with the bully's interpretation of his rules' meanings, the bully will say that only he will decide how his rules apply and, finally, this same fellow invests himself with a monopoly of force and violence toward anyone refusing to submit to his self-serving interpretations and applications. In short, the bully's prerogatives depend upon his superior physical force to get his will.

The phrase *divine-right-of-kings* comes from the notion that kingship is the divine and absolute right of hereditary descent of a king's firstborn son. As old as Babylon, the doctrine surfaced in England under this new label during the time of James I. The Stuart monarchs of England claimed this doctrine as the basis of their power; Sir Robert Filmer tried to give the divine-right-of-kings theory academic dignity; Algernon

[769] 1 *Timothy* 2:5. Any false mediator claiming to stand between God and the individual—whether an individual, an institution, or both; whether in addition to Christ or in exclusion to Him—is an usurper seeking to dominate for wrongful gain. Such a false middleman takes his cut in money and loyalty at the cost of individual dignity and freedom.

Sidney, John Locke, and Thomas Paine, however, successfully discredited the notion in both England and America. "Although the idea had its roots in Roman imperial concepts—and was destined to be embraced for two centuries by continental despots—it was novel to the English, and ran contrary to the whole current of English thought."[770]

In practice, the doctrine *divine right of kings* views the state and chief-of-state as a semi-deified and direct representative of the gods, as the true God, or by extension, as a son of god to administer divine sovereignty on earth. Put another way, the divine-right-of-kings theory teaches that human rulers, by virtue of their heredity succession, sit in the place of deity on earth—empowered to dominate their fellow men and to be mediators between deity and men.

A comparable New Testament term expressing the divine-right-of-kings theory is *αντιχριστος* (*antichrist*),[771] meaning "instead of," or "in place of, Christ." Taken into English, the Greek preposition *αντι* (*anti*) came to mean "against" because usurpation of another's position and power puts the usurper in a position contrary to that person. Nevertheless, its primary New Testament meaning remains "instead of," or "in place of." An antichrist, therefore, is not always in open adversity to Christ, but one insisting that he is Christ's helper, standing in Christ's place. Thus, the traditional civil law has viewed the state's magistrates as standing in the place of God and the only real power on earth. Such was the understanding of the term *anti* in the first-century Roman Empire and in the New Testament:

> There is conclusive proof now that the dominant meaning of *αντι* in the first century was *instead of*, "By far the commonest meaning of *anti* is the simple *instead of*" (Moulton-Milligan: *Voc. of the Gr. N.T.*). This statement refers to papyri usage. Professor Whitesell (Chicago) made a study of *αντι* in the Septuagint and found thirty-eight passages where it is rightly translated *instead of* in the R.V. Since *αντι* is used in two atonement passages in the New Testament, such a translation needs careful consideration. This translation applies especially to the following: Mt 2:22, *Archealus was reigning over Juedea instead of (αντι) his father Herod*; Luke 11:11, *and he instead of (αντι) a fish*

[770] BOBRICK, *supra* note 316, at 270.
[771] *See, e.g.*, 1 *John* 2:18, 22; 4:3; 2 *John* 7.

> *gave him a serpent; . . .* Heb. 12:2, *Jesus . . . instead of (αντι) the joy that was set before him endured the cross.*[772]

In the civil-law tradition, rulers rule *instead of* God. Understanding the civil-law view of the state as a species of deification or semi-deification helps explain the enormities of the Roman emperors and other civil-law despots. Through use of the civil law's inquisitorial system, these rulers labored to induce fear as the stabilizing ingredient of their rule. Among their tools in England were the Star Chamber, the Privy Council, the Tower prison, the rack, and conspiracy. Using such tools of terror to multiply accusations and extract confessions, the state will expand its abuses to a near-unlimited number of innocent victims. Thus, the civil law plays out its principles to their logical conclusions.

§ 3.8.2
English Kings & Divine Right

In 1328, during the reign of Edward III., Parliament enacted a statute barring any commandment of the king from interfering with justice: i.e., disturbing or delaying the processes of the courts. This bar on the Crown enforced custom by two demands: that the executive power and the judicial power must remain separate, foremost to insure the independence of the judiciary from the executive; and that all must obey the law, even if the king commands to the contrary. Thus, Parliament again recognized that which the Anglo-Saxons had always held and the Bible reveals: true law exists from eternity past; therefore, neither is the creation of any man nor is the decree of any king superior to it.[773]

That the law is above the king was not new to the common law. For example, about 1320, the continental Saxon lawyer Eike von Repgau compiled the customary laws of Saxony, titling his work *Sachsenspiegel* (Mirror of the Saxon Law). Because Repgau was never university trained, canon law's scholastic doctors had never indoctrinated him; thus, the *Sachsenspiegel* never makes direct reference to Roman civil law. Repgau, echoing the ancient first principles of the *Volkriht*, states in his prologue: "God himself is law; therefore, law is dear to him." He further says that

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[772] H.E. DANA AND JULIUS R. MANTEY, A MANUAL GRAMMAR OF THE GREEK NEW TESTAMENT 100 (1927).

[773] See, *e.g., Jeremiah* 36:20–31, 37:2, wherein God held two of King Jehoiakim's servants (Jehudi and another unnamed) and the people of Israel accountable (*see Jeremiah* 36:31) for brooking Jehoiakim's contempt of God's Word written and for failing to hearken to God's Word.

obedience to the king is no safe harbor for lawlessness because it is the right of all to "resist a lawless decision of his king and his judge . . . ."[774]

Over three centuries after the reign of Edward III., Samuel Rutherford put the biblical and common-law order of authority in tidy words: *lex* (law)[775] is above *rex* (the king or prince),[776] and not *rex* above *lex*. In short, law—the standard of God—subjects the king and never *vice versa*. Consonant with this principle, the reformers held that all authority in heaven and on earth proceeds from God, through His Word, to the individual. It follows, therefore, that the Word of God stands in authority over God's people; God's people never stand in authority over the Word of God. By the same principle, the common law, being in accord with Scripture, stands in authority over the king and never the king over the common law.

On the other hand, Richard II., reigning from 1377 to 1399, claimed for himself the powers of an absolute monarch after the pattern of the civil law. Basing his authority upon his ability to flaunt force, when meeting with Parliament, he surrounded himself with soldiers brandishing cocked crossbows. By this and other forms of bullying, Richard forced his will into parliamentary legislation. Nevertheless, Parliament and Henry of Lancaster bided for the right opportunity; in 1399, while the Richard was away in Ireland on a punitive expedition, they overthrew his administration. Significantly, the speaker of the House of Commons, not the barons, announced to Richard II. that Parliament had deposed him. The House of Common's claim of authority

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[774] VEIKE VON REPGAU, SACHSENSPIEGEL: LANDRECHT IN HOCHDEUTSCHER UBERTRAGUNG prolog, III, 78, no. 2 (Karl August Eckhardt ed., 1967), *quoted in* BERMAN, *supra* note 9, at 503–04. Repgau, nonetheless under the sway of the imperial church, supported the will of Rome in other ways. *See id.* at 504. Legislation and its application that are inconsonant with God's Word are lawless and, therefore, work injustice; the common law provides orderly remedies for those seeking to right such wrongs. *See generally Psalm* 138:2: "You have magnified your Word above all your name." See generally app. 19 of this book (expositing *Psalm* 138:2). The Word of God claims to be the perfect expression of the will of God and, therefore, inextricably identifies its precepts with the person of God. *See John* 1:1. God has chosen to subject Himself to His Word by promising to keep it and never to break it: God has bound Himself to keep His word by solemn oath; having no one greater to swear by, He swore by Himself. *See Hebrews* 6:13.

[775] The Latin *lex* is a legal term of acute meaning best seen in contrast with *jus*, its Latin synonym, also translated "law." *Lex* denotes positive law commanded by certain persons called legislators: i.e., legislation, such as a particular decree or statutory law. *Jus*, on the other hand, refers to law abstracted from its application, such as a general consideration of a personal "right."

[776] Latin does not provide the definite article, but the English translations of the Latin add it where the context or the author's clear intent renders the Latin noun definite. Thus, *lex*, *rex* is "the law [and] the prince." *See generally* SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE (photo. reprint 1982) (1644) (presenting biblical understanding of the superiority of the law over the prince).

over the King was a weighty event in the common law's history because it drove home the ideal that kings must always rule by consent and never by threats and force.

Richard II. had tried to supplant the common law in England with Justinian's Code; quoting from it, he declared that, as king, law was in his mouth and his breast.[777] In answer, Henry of Lancaster, with the backing of Parliament and the nobility, imprisoned Richard in Pontefract Castle; a few months later, he died—whether of starvation or by outright murder remains a question unsolved. Though some later deemed Richard II. a martyr to the cause of the oppressed, his reign and demise revealed an English zeal for common-law freedoms: the king was never to act free from the advice and consent of the realm, spiritual and temporal; indeed, only with such advice and consent had Henry IV. accepted the throne.

In 1399, after deposing Richard II., the English temporal and spiritual powers, including Parliament, countered civil law's threat of absolutism by choosing Henry IV., son of John Wyclif's supporter John of Gaunt, to be king. Henry IV., however, was merely a descendant of Henry III., not heir to the King's real property: i.e., title[778] to the Crown lands by right of hereditary descent was not vested in him. England's monarchists believed that being a descendant of the royal line fell short of qualifying one to accept the English Crown, demanding, in addition, that to accept the Crown, one must also hold rights to all royal lands. Thus, in their thinking, one legal fact was necessary to be king: the monarch must hold

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[777] Civil law provides for a government of men, not of laws. Since all men, to varying degrees through the fall of Adam, are wound up and bound up in their own whims and difficulties, governments of men become governments that rule by the rulers' (legislators') natural passions. In short, good men cannot be the key to good government. Rather, the key is the good God, working through less-than-good men under the restraints of due process. "No one is good" said Christ, "but God." *Matthew* 19:17. Let us, therefore, hear less of the goodness of men and more of the goodness of God.

The humanist-minded concede that all men have faults, but quickly add that some men are better than others are. Scripture, however, reminds us that those making such arguments are without understanding. "They [who] among themselves are measuring themselves and comparing themselves with themselves," says the apostle, "understand not [*ου συνιασιν: ou sooniasin*, "without understanding"] . . . but rather [*αλλα: alla*], [we boast only] according to the measure of the measuring rod which He, the God of measure, has measured to us." 2 *Corinthians* 12–13. Never has the Paul worked one root any harder in such a short space as he has here worked the root *μετρ–* (*metr–*: having to do with measuring); by so doing, he stresses the point. Indeed, any given yardstick always measure up to its own length; so also, any man can always stand to his own height and justify his own behavior by saying it is not as bad as another's, or that it is at least as good as another's.

[778] *Title* is evidence of a right or rights, which is authority. Title in land signifies possession of a bundle of rights: authority over land. Title of rank, such as "sheriff" or "coroner," also signifies possession of rights: authority to act.

inheritance rights to the Crown lands, for to hold inheritance rights had to include natural descent.[779]

Henry not being heir to the royal lands, he derived no power from wealth; therefore, he based his royal authority only on common-law principles, that is, the advice and consent of Parliament. Thence, at Parliament's offer, Henry accepted the throne, agreeing to rule only with Parliament's advice and by its consent. Henry IV., by personal inclination and necessity, reigned at Parliament's pleasure, thereby further entrenching the common-law principles of a limited executive.

Thus, during Henry's reign, England again enjoyed Anglo-Saxon limited kingship. Moreover, because the House of Lancaster was not heir to royal lands, and the wealth and power flowing therefrom, the Lancaster monarchs remained sensitive to public opinion, especially in matters respecting the English Constitution: *e.g.*, petitions that the Commons intended to form into statutes, advice and consent of the lords temporal (large landholders) and spiritual (the bishops), and restraint of the Crown from exacting retribution against speech and debate in the House of Commons.[780]

The Duke of York, on the other hand, took the monarchists' view: believing that heirship to England's throne was by descent of royal lands; he concluded that he was entitled to the throne. The Duke sharpened his reason to justify his craving, set his resolve, and seized power by force. About that time, in order to save their lives, Sir John Fortescue, along with Henry IV. and Henry's son, fled into French exile. In 1471, while in exile, Fortescue responded to the Duke of York's canon-law-code leanings by writing *De Laudibus Legum Angliae* (*In Praise of English Law*), contrasting English common law, and French civil law.

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[779] The monarchist ignored the Saxons' inheritance law of gavelkind, with each sibling inheriting equally; following instead the Normans' inheritance law of primogenitor, with the oldest son taking all to the exclusion of his siblings. "English preference for a single-file male descent—that is . . . primogeniture—was never cordially received in this country [the United States]. Our statutes of descent and distribution uniformly provide for sons and daughters sharing the inheritance equally." THOMAS F. BERGIN & PAUL G. HASKELL, *Preface to* ESTATES IN LAND AND FUTURE INTERESTS 9 (1984). American common law in the several states follows this English principle of equal inheritance of property among siblings, known to the Saxons as *gavelkind*.

[780] The Framers derived the Constitution's Speech and Debate Clause from the colonial legislatures, which had derived this clause from the unwritten British Constitution. *See* U.S. CONST. art. I, § 6. "In the British Parliament," write Justice Story, "it [freedom of speech] is a claim of immemorial right." STORY, *supra* note 89, at 309. We take it (though we cannot be certain) that Justice Story uses the phrase "immemorial right" in its common-law significance: a right recognized as far back as the accession of Richard I, 23 September 1189, also marking the end of the reign of Henry II.

Using the common-law principle of precedent (*state decisis*), Fortescue said that the common law never gives the king authority to change the law or tax the people without their consent. Moreover, any consent to taxation must be by the approval of Parliament. In addition, said Fortescue, the common law binds the king in duty to protect the people's lives. With cogency, Fortescue argued that the common law's limited monarchy is superior to the civil law's absolute monarchy set forth by Justinian's Code and as practiced in France. Fortescue's doctrines harked back to the pre-Norman invasion traditions of the Anglo-Saxons. In ensuing centuries, each time the threat of civil law's divine-right-of-kings doctrine reared its head in England, those of kindred spirit with Fortescue republished, with good effect,[781] his *In Praise of English Law*.

By the fifteenth century, the idea of national sovereignty had emerged on the European continent and gained popularity. Political leaders saw in civil law's absolute monarchy a tool to advance national sovereignty by insisting upon the absolute power of a king within his own nation. Having long lived under the Roman government of church and state in symbiotic solidarity, those on the continent were accustom to civil-law theories and knew of no other choice for law and government. Civil law had permeated the Continent, dominating men's minds: the people saw Rome's civil law as a total law and government. The canon law of the Roman Church and the civil law of the Roman state law were the same basic law, functioning together to form the *jus commune*, the imperial law of Rome. As nations on the continent threw off the absolutism of Rome's yoke, they embraced the absolutism of another more local chief-of-state, trading an emperor far off in Rome for a despot at home. The rise of national sovereignty on the continent intrigued England's monarchs, tempting them to exercise royal absolutism—now called the divine-right-of-kings—in their own country.

Henry VI. held the English Crown for thirty-nine years, during which he demonstrated the dangers of absolute royal power, but in a manner wholly different from others. Instead of using his power to dominate others, Henry exercised his prerogatives in undisciplined generosity. Emotionally weak, mentally lazy, and subject to undue influence, he gave away the royal lands: the inheritance upon which his supporters rested his kingship and upon which Henry and all England depended for income to fund his duties of justice and the common defense. In 1444, in

[781] See generally § 3.7.6 of this book (presenting additional information concerning Fortescue's support of the common-law tradition).

an effort to arrest his recklessness, his Council established the three royal seals and the office of keeper for each one: the Privy Seal, the Signet Seal, and the Great Seal.

Thereafter, to be binding, law required royal transactions to be in writing and bearing one of these three seals: a requirement meant to work as a safety net for an unfit king, such as Henry VI. Over time, additional custom arose, requiring that one of these three seal keeper's counter signature must accompany the monarch's signature in order for it to carry government authority—the custom becoming part of the English Constitution. In spite of setbacks, such limitations on the power of the monarchy continued to multiply. For example, in 1534, Parliament went further and passed a statute requiring that the counter signature of three appointed officers of government accompany all acts by the king's signature—, which also meant that Parliament could further limit the king's power by controlling these three men.

Edward IV. was out to make the civil law the law of England. Ruthless, Edward murdered Henry VI. and his sons. Had he lived longer, he likely would have established civil law and its divine-right-of-kings doctrine in England. Fortunately, for posterity, his womanizing limited the power he intended.

Henry VII., by battle in 1485, vanquished rivals for the throne, but being a grandson of Henry VI., he was an unvested heir. Consequently, he submitted to Parliament's confirmation of his kingship. Thus, as did Henry IV., he based his authority upon Parliament's invitation, advice, and consent, not upon the absolutism of divine right by inheritance as the vested heir apparent.[782]

Henry VIII. reigned from 1509 to 1547. In 1533, he declared himself emperor of the realm by divine right, after the fashion of civil law. Henry was a consummate manipulative politician; he sought, however possible, to get what he wanted, while remaining ever careful to please the political

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[782] *See* M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 308 (1942). Down through history, when opportunity afforded, Parliament wielded its weight against monarchs, limiting their power, allowing them to rule only under the ancient common-law principle of advice and consent. Most times, during this constant struggle between the Crown and Parliament, Parliament was without military force to back its point of view but remained ever present and eventually won the day. Nowadays, the monarch of England is inferior to Parliament, while an indispensable component of Parliament. The English Parliament, says Blackstone, knows no equal on earth; the Parliament consists "of king, lords, and commons." 1 BLACKSTONE, *supra* note 12, at 143. Following the English Commonwealth (1649–1660), English sovereignty remained with the Crown, which, now made a part of Parliament, confers its sovereignty to Parliament. In any event, English sovereignty remains understood as derived from God and, thus, Parliament has limited sovereignty.

majority. By creative maneuvering, Henry often controlled Parliament, gaining his legislative will by persuading a Member of Parliament to tack Henry's pet amendment on a popular bill. Thus, even if another Parliamentarian opposed Henry's amendment, he dare never vote against the popular bill to which it attached—to do so insured political backlash. Nevertheless, due to his overriding addiction to be admired, Henry VIII. never tried to levy taxes without Parliament's consent.

So long as the civil law furthered Henry's power, he encouraged its use. He coveted the imperial prerogatives of the Roman pope; therefore, instead of suppressing the powers of the Church, he sought rather, to transfer those powers to himself. Henry, through patient planning and execution, even garnered enough political support to transfer Roman Church property to the Crown. Rome, by demanding her continental vassals to invade England, had handed Henry VIII. popular justification to weaken Rome's ability to fund an invading army: Henry countered Rome's threat of invasion by suppressing her monasteries in England, confiscating Roman Church property and income, and shrinking the number of Rome's abbots and friars in Parliament.

Though effective in establishing his political power, Henry struggled to father an heir for the throne; he had many wives and concubines, but few legitimate children. The story of Henry's reign is best described as a series of manipulations designed to allow his enjoyment of the absolute powers offered by Justinian's Code and as wielded by the continental European imperial monarchs. In his passion for these prerogatives, envy drove him to depose Roman church and lands.

In irony, and despite his thirst for civil-law power, God used Henry as much as any other monarch to establish the Bible in England, thereby breaking the threat of Roman canon and civil law. The Bible distributed at the command of Henry VIII. was, in most respects, William Tyndale's translation, renamed the *Matthew Bible*. Moreover, Henry required—upon pain of an exponentially increasing fine for continued noncompliance—that every English parish purchase a copy of the Matthew Bible and make it available to every person desiring to read it; for the one unable to read, he required each parish to provide a reader.[783]

[783] Coveting the admiration of his subjects, Henry VIII. remained careful to satisfy public opinion. Characteristic of the absolutist Tudor monarchs was their ongoing care to create the perception that the welfare of the people deeply moved them to compassion. Thus, once Henry saw that the English people craved the Bible in English and foresaw the popularity achievable by creating the perception that he has provided it for them, he authorized an English translation for printing and distribution. Hiring artist Hans Holbein and printers to design a frontispiece, Henry had them depict him enthroned and handing down copies of the English translation to his lieutenants, Cranmer and Cromwell, who then

In 1603, James I. came to power. Unfortunately, while he had been King of Scotland, and even though under strong Protestant influence, the civil law had taken effect on him; James claimed that he was God's absolute viceroy in England, ruling by divine right and taking for his motto, *rex est lex loquens* (the king is the law speaking). Lord Chief Justice Coke,[784] confronting King James on this point during a royal council meeting, risked his life by asserting two common-law fundamentals: the king is subject to the same laws as all others and the common law forbids the king from meddling with the courts. King James retorted to his council, "The King protecteth the common law," to which Coke straightway rejoined, "The common law protecteth the King."

At Coke's statement of truth, for fear of the king's rage, silence fell over the room; then Coke found his tongue for the explanation, "It is not customary, the great Chief Justice Fortescue had once said, for the kings of England to sit in court or pronounce judgment themselves."[785] If the

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were distributing the Bibles to the people. Cranmer chose Miles Coverdale to produce Henry's official revised version by basing it on the Matthew Bible, which was nearly all the translation work of William Tyndale. Calling the Great Bible, Henry, by authorizing and commanding its distribution, authorized and commanded distribution of Tyndale's work of translation.

Though Henry VIII. was behind Tyndale's murder on the continent, he was politically astute, remaining careful to appear uninvolved. That vanity and lust drove him is clear; God, nonetheless, used this monarch to propagate His Word in English. Before one year had passed after William Tyndale's final prayer, "LORD, open the King of England's eyes"—shouted just before the henchman strangled him at the stake on 5 September 1538—, Henry VIII. commanded distribution into every English parish Tyndale's translation of the Bible, slightly edited.

Henry's royal injunction stated in part, "[Y]ou shall . . . expressly provoke, stir, and exhort every person to read, as that which is the very lively Word of God . . . ." Further, it was fitting that the publisher printed Tyndale's translation of *Proverbs* 21:1 on the flyleaves of each of those Bibles. In modern English it reads: "The king's heart is in the hand of the LORD . . . He turns it how and wherever He wills." In certain respects, Henry VIII. returned England to the ecclesiastic and political autonomy Britain's inhabitants enjoyed before September of A.D. 672. In that year, at the Whitby conference and at the council at Hertford, a commission of Roman priests, by presenting the canon law and demanding its reception by solemn oath, seduced the dominant portion of the British Church into uniformity with Rome and her civil law.

Tyndale's prosecutors—civilians Ruwart Tapper, Jacques Latomus, and judge Pierre Dufief—conducted their proceedings against William Tyndale in the spirit of inquisition. Tapper, later to become inquisitor general of the Low Countries, once remarked, "It doesn't matter whether those we execute are really guilty or not. What matters is that the people are terrified by our trials." BOBRICK, *supra* note 316, at 134, *quoting* LUPTON, TYNDALE THE MARTYR 138 (n.d.). The policy if the civil law's inquisition is terror-producing prosecutions and trials.

[784] See generally § 3.7.8 of this book, for a brief discussion of the life and adventures of Edward Coke in his elevation of the common law against the civil-law claims of James I.

[785] CATHERINE DRINKER BOWEN, THE LION AND THE THRONE 291–306 (1956). In relating this incident, the writer does not intend to merely eulogize Coke because along with virtues, Coke suffered faults. Nonetheless, demanding a limited kingship under common law, Coke

king overrides with the courts, of what use are the courts?[786] Coke asked. Though James I. later dismissed Lord Chief Justice Coke from the Bench, Coke had the last hurrah: he won a seat in the House of Commons, from whence he gave James more resistance than he had as Lord Chief Justice.

James I., drawn to the old Babylonian doctrine of absolutism, lent to it new support from the Norman doctrine of primogeniture. Likening his claimed imperial prerogatives to those of priests, James boasted of his skill at ruling, dubbing it *kingcraft*. Sir Robert Filmer, in his *Patriarcha*, later formed James's brand of monarchical absolutism into a system, "which became the badge of the most violent class of Tories and high churchman."[787] Filmer's divine-right-of-kings theory taught that primogeniture[788] was the divine grant of absolutism; hereditary monarchy of the firstborn son, Filmer insisted, was divinely ordained and "anterior to the Christian and even the Mosaic dispensation."[789]

Thomas Paine later argued to the American Colonists[790] that the patriarchal theory of kingcraft according to primogenitor is contrary to

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rightly challenged the civil-law prerogatives James claimed for the Crown. Coke saw the power of the legislature (Parliament) and the conviction of common lawyers to be the available tools to limit the Crown.

When abuses of government move Parliament and lawyers to moral indignation, they will seek to limit state power: at common law, the legislature is a check on the executive's power; and rightly informed common lawyers are indispensable in defending liberty in the courts—case by meticulous case. Given the circumstances of his times, Coke's best available option for limiting the Crown was to assert the sovereignty of Parliament over the Crown. This, however, led to a less-than-common-law outcome: the theoretical sovereignty of Parliament in England instead of coequal branches of government and separation of powers. Coke saw in Parliament his political opportunity to strike a blow against both imperial priestcraft and statecraft (the divine-right-of-kings doctrine); without deviating, he focused his energies on that course. After his removal from the Bench, Coke, as a Member of Parliament, continued his earnest opposition against the cravings of James I. for civil-law-like powers.

[786] *See Isaiah* 33:22. This passage *identifies*, but does not *separate*, the three offices of earthly governments because the reference is to the Messiah, who alone is worthy to hold all the authority of all three offices simultaneously in Himself. No mere creature, however, is to usurp this divine prerogative. *See Isaiah* 48:11. The common law's separation of powers is scriptural, baring any single person—or combination of persons acting by a single will—from concentrating in himself the three offices of government: prophet (legislator), priest (judge), and king (executive). Isaiah the prophet also distinguishes these three offices of government, the common-law tradition also holding them separate during this present age.

[787] T.B. MACAULAY, HISTORY OF ENGLAND, ch. 1, pt. 4.

[788] Primogeniture required the oldest son to inherit his father's real property. Inheritance laws throughout the several United States reject the Normans' primogeniture and follow the pattern of the Anglo-Saxons' gavelkind, requiring that, in cases of intestacy, all of the deceased person's children share equally and that property escheat to the government only if there are no heirs.

[789] *Id.*

[790] *See generally* THOMAS PAINE, COMMON SENSE (reprint 1986) (1776) (citing principles and examples from Scripture to show the danger of kingcraft). Paine, recognizing the

Scripture. Moreover, the history of the English kings defied Filmer's theory: William Rufus, Henry I., Steven, John, Henry IV., Henry V., Henry VI., Richard III., and Henry VII., predecessors of James I., "all reigned in defiance of the strict rule of descent."[791] During the eighteenth and nineteenth centuries, both Sidney and Locke, writing in light of Scripture, defied Filmer's notion of equating familial and political fatherhood, resulting in the king being father to all in his realm. Filmer's ideas, being baseless, made little impact. Then as now, men remember Filmer only because John Locke wrote his *First Treatise*[792] and Algernon Sidney wrote his *Discourses*[793] against Filmer's views.

Charles I., following James I., claimed divine right and tried to assert his rule by levying taxes without Parliament's consent. His method was crafty: Charles dispatched his revenue agents to well-healed Englishmen, insisting that they each lend him, for example, £500 interest-free. If the taxpayer balked, the King issued a writ to the local sheriff commanding his victim's arrest for transfer to London and imprisonment of undefined time. Then, the King's Privy Council, at their leisure, used the Star Chamber Court and civil law's inquisitorial techniques (discomfort and pain, and fear of the same) to discover the taxpayer's assets.[794]

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tendency of monarchy toward absolutism, likened monarchy to priestcraft: "[M]onarchy in every instance is the Popery of government." *Id.* at 76.

[791] T.B. MACAULAY, HISTORY OF ENGLAND, ch. 1, pt. 4.

[792] JOHN LOCKE, THE FALSE PRINCIPLES AND FOUNDATION OF SIR ROBERT FILMER AND HIS FOLLOWERS (1698), *in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1970) (1690). "And truly, I should have taken Sr. Rt. Filmer's *Patriarcha* as any other treatise, which would perswade all Men, that they are Slaves, and ought to be so . . . I confess myself mightily surprised, that in a Book, which was to provide Chains for all Mankind, I should find nothing but a Rope of Sand." *Id.* at 159 (archaic spelling and capital letters in original).

[793] SIDNEY, *supra* note 451, at 102–03.

[794] Henry VII. had used the same extortion methods of tax collection as Charles I., but with more success. In 1483, Parliament, by statute, outlawed the Crown's use of extortion, but, being the legislature, lacked means of enforcement. Then Henry VII., while setting his machinery of extortion in motion, waived aside Parliament's statute as an usurpation of his prerogatives. If Henry's targeted taxpayer lived in extravagance, Henry's revenuers told the target that the king expected a larger loan. If, on the other had, the target lived simply, Henry's revenuers told the taxpayer that his simple living must have allowed him to save enough to make the same loan as the man who made an outward show of wealth. Taxpayers called the double horns of this dilemma Morton's fork. When it came time for the Crown to repay these loans, it either repudiated them altogether or remitted freshly minted coins in the proper denomination, but containing less gold or silver than had been lent. The Constitution, though giving the power of tax collection to Congress, provides no mechanism, but leaves it to Congress to articulate its enforcement power through legislation. Congress shall have the Power To lay and *collect* Taxes, . . . to pay the debts . . . of the United States." U.S. CONST. § 8, cl. 1 (emphasis added; capital letters in original).

The dilemma of Morton's fork continues to haunt United States taxpayers targeted for audit or prosecution. According to testimony given before Congress in 1998 of former federal tax agents, the IRS targets two classes of people for audit: those appearing to have a

Foreseeably, taxpayers developed distaste for the devices of inquisition. In 1649, Parliament tried Charles I. for high treason; upon conviction, it gave sentence against him, sending him to the block.

From 1649 to 1660, Parliament governed the Commonwealth of England; the executive, Oliver Cromwell, took the position and title Lord Protector, holding this position for almost the duration of the Commonwealth. Cromwell's son Richard, after his father's death, held the position for one year but fared less well. Then, in 1660, Parliament invited Charles II. to the throne under his promise to observe the common-law tradition.

James II., reigning from 1685 to 1689, tried to tamper with the courts, sparking England's ire.[795] Underestimating English zeal for common-law government at every level and rank, James persisted in his civil-law convictions. In his slowness to see the light, he clung to the throne; until, at length, England's scorn reached into James's household, his cooks refusing to prepare his meals. Now feeling the heat, but too late to see the light, he did recognize the writing on the wall and attempted his getaway to England's eastern coast, from whence he hoped to complete his escape to France. His carriage driver, however, refused to drive him, forcing him to hire a hackney. Upon arriving at the coast, he discovered that he was a day late; Parliament's agents, having already arrived the day before, captured him. James's former subjects, however, wanted shed of him; confident that his fear of the English people would drive him from England to France, Parliament loosed James II. and sure enough, he flew the coop.

Parliament, while acting quick to insure against the abuses attempted by James II.—especially against the Crown's likelihood of meddling with the courts—, invited Mary, daughter of James II., and her husband William of Orange, to occupy England's throne. During the reign of William & Mary, Parliament enacted the English Bill of Rights of 1689, barring monarchs from meddling with the courts or with criminal procedure, especially where such meddling conflicted with an act of

surplus of income and those making $20,000 per year or less. The IRS assumes that no one can live on such a small amount; thus, anyone claiming income of $20,000 or less, the IRS presumes to be a liar.

[795] *See generally* 53 MO. L. REV. 1 (1988) (Fratcher provides a discussion of how, over the centuries, the English have acted to deprive the Crown of power to intervene in the courts and the effect of these events on the shaping of the American Constitution). As a further example, on 19 November 1764, a judge of the New York Colony refused to obey the colonial governor's order. The judge found that, as to a question of law it was doubtful, though possible, that the king had warrant to interfere with the courts through his agent the governor; but as to a question of fact, the king, by way of the governor as his agent, was without any warrant to meddle.

Parliament. The Crown retained the power of veto over Parliament's acts, but as a practical matter, it has had negligible use. The Crown has used the royal veto only once since that time, and even then it was an unpopular act. This Crown's executive veto remains good law, but by custom, the Crown will only use it with the advice and by the consent of the prime minister.

Despite England's national consciousness gained over the centuries demanding independent courts, the danger of the executive tampering with the courts persisted in breach of the common law's separation-of-powers doctrine.[796] For example, in 1834, King William IV. tried to give unlimited jurisdiction to the Court of Common Pleas by signing an order directing it to hear *all* cases. The court, however, held William's order *ultra vires*, that is, beyond king's power and, therefore, unconstitutional. As the United States President, the English Crown lacks authority to vary the jurisdiction of the courts. As the unwritten English Constitution sets the jurisdiction of English courts, so also the written United States Constitution limits the jurisdiction of the Supreme Court.[797]

Although no longer known as the divine right of kings, demagogues have continued to use the civil law to afford themselves absolute power to do atrocities, such as did Hitler and his Nazi régime and as has Stalin and his communist state. Moreover, in civil-law nations, even as the state's agents multiply the state's abuses of power, the civil law extends to them the ruler's immunity. In a word, obedience to the orders of the semi-deified state, whether embodied in a chief executive or a legislature, or

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[796] See generally § 3.11.4 of this book (comparing and contrasting the English practice of separating its three branches of government with the American practice). Respecting separation of powers, the Americans have been more thoroughly English than have the English; the Americans have adhered closer to the ancient common-law standard. The theoretic sovereignty of the English Parliament stands in contrast to the United States government's three branches arising in co-equal power as creatures of the Constitution, placing the national legislature (Congress) on equal competitive footing, but not above, the executive and judicial branches.

William Blackstone's views concerning the sovereignty of Parliament would have repulsed Englishmen of the thirteenth century, in that they remembered well the ideal of the Anglo-Saxons' balance of power between the king and the nobility assembled and the courts of juryman, of which all participated. Blackstone states of Parliament, "[T]he legislature, being in truth the sovereign power . . . acknowledges not superior on earth." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 63 (9th ed. 1783). Such remains the theoretic sovereignty of the English Parliament.

[797] In addition, the United States Constitution grants to Congress plenary and exclusive authority to define the jurisdiction of the lower federal courts. In all events, the Constitution limits the jurisdiction of the federal courts to matters arising under the Constitution, laws, and treaties of the United States. *See* U.S. CONST. art. III, § 2, cl. 1.

both, is a supposed safe harbor against the accusation of crime and the suffering of its penalty.[798]

§ 3.8.3
Civil Law's Inquisition

Reginald Pole . . . observed that in matters touching the pope, we must not regard either his character or his life, but only his authority; and that the lapses of the pope in morals detract noting from his infallibility in faith. Henry [VIII.] understood this distinction very clearly, and showed himself a pope in every way.[799]

Common-law rights are foremost personal safeguards against abuses of the civil law and its inquisitional character. Thus, the civil law's application of its inquisitional devices quickens common-law rights to action; of these rights, none illustrates the inquisitional character of the civil law any better that the right to remain silent. Beginning in the sixteenth century and reaching pitched conflict during the seventeenth, Providence put many common-law rights to the purifying test of fire, becoming—as the common law puts it—of record. The right to remain silent was so tested. Of ancient origin, this right forbids the government from forcing the accused, or one in danger of accusation, whether

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[798] Unlike common-law countries, in civil-law states, obedience to the state—in the person of the emperor-legislator, a combination of persons as legislature, or, as in Nazi Germany, Hitler as chief-of-state—is an affirmative defense to any crime, no matter how heinous. An affirmative defense admits the facts of the accusation, but adds new facts that, if true, defeat the allegations.

Therefore, under principles of civil law, any one accused of war crimes during World War II could have successfully plead his affirmative defense: admitting that the allegations of acts done are true; but then adding that those acts alleged are not crimes because he did them in obedience to the state's orders given to him through his military superiors. Such an affirmative defense succeeds under traditional civil law because civil law recognizes no law above the will of the state: one's political or military superior from which there is no appeal. Thus, the civil-law tradition prohibits conviction for obeying state power. To refuse to recognize—as does civil law—law above the state to which men must take heed and can of right appeal, is to accord to the state attributes of deity, even if never proclaimed as such.

The Allied powers' decision to take the common-law viewpoint on this matter—i.e., every individual must bear responsibility for the lawfulness of his obedience to the state's orders—enabled genuine prosecution at the Nuremberg war trials. Civil law falsely teaches that one's obedience to an imperial state exonerates one from wrongdoing under the legal fiction that the state can do no wrong (i.e., ultimate power equals ultimate right). In common-law countries, on the other hand, the non-delegable responsibility to discern one's peculiar duty to one's Creator rests squarely on the individual. Obedience to mundane powers never excuses crime.

[799] 2 D'AUBIGNÉ, *supra* note 19, at 319.

innocent or guilty, to disclose information that others can use to lead to his further accusation.[800]

In seventeenth-century England, the inquisitors dragged before their Star Chamber Christian laymen, lawyers, and preachers to question them concerning Christian gatherings, teaching of the Bible, and observance of the Lord's Supper without state consent. If the target of investigation claimed the right to remain silent—as often occurred—the state put him under inquisition: torture and the Tower were used to wring out confessions, as though attempting to wring water from a dry rag. Claims of the right to silence found in the records of the Star Chamber proceedings reveal that the brave men and women placed under inquisition there claimed a right long-established in custom.

When the smoke had cleared following the royalist's war against Parliament, the right to silence was, for a time, more all embracing and effectual in protecting privacy of conscience than it is nowadays in the United States. In the tradition of the common law, the right to silence is co-extensive with the right to free speech, being the other side of the same coin.[801] During the sixteenth and seventeenth centuries, however, the Crown's Star Chamber violated this right, using civil-law doctrines such as entrapment, conspiracy,[802] forcing of answers under oath, deceit, discouragement, intimidation, and torture:[803] all offspring of the civil law,[804] having crept into common-law countries by way of the Star Chamber's civil-law inquisitions.[805]

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[800] Respecting the right to remain silent, common lawyers of the seventeenth century expressed the principle thus: "The law never requires any man to slit his throat with his own tongue." American common lawyers later put it that the law never requires the accused to provide the rope for the government to hang him. Following the biblical requirement of at least two witnesses to support each material fact of each accusation against a defendant lessens the government's tendency to violate a suspect's right to remain silent, his confession alone never being enough to convict. According to Scripture, if the state's only witness is the accused himself, another witness is still required to convict. If, on the other hand, all that is required for conviction is the accused person's single confession, government is tempted to violate the dignity of the accused—and therefore God's dignity because God has made every person in His image— by forcing him to speak against his will in order to obtain that confession.

[801] See generally §§ 4.8–4.8.2 of this book (providing a brief historical background, the present state of the right to remain silent and scriptural foundation for the right).

[802] In 1611, the Star Chamber formulated the crime of conspiracy. Poulterers Case, 9 Co. 55b, 77 Eng. Rep. 813 (1611). See *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973).

[803] See generally § 6.3 of this book (discussing the civil-law tradition's two weapons of self preservation: administrative law and fear).

[804] *But see* T. TAYLOR, ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 36 (1992). Some judges at the Nuremberg war-crimes trials objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo-American

§ 3.8.4
Common Law's Neck Verse

The fatal clash came over the question of Church courts. Since William the Conqueror's time, the Church had possessed the right to try its own wrongdoers in special Church courts where punishment was much lighter than in the ordinary courts. Besides priests and deacons, a huge class of persons could claim to belong to the clergy and the King' judges knew that murderers and thieves were escaping punishment because they lived on Church property or were able to mumble a few words in Latin.[806]

Courts hold jurisdiction over certain persons (*in personam* or personal jurisdiction) and over certain things (*in rem* jurisdiction). Combinations of jurisdiction under these two categories vary. For example, Judge Joseph Parker, federal judge in Fort Smith, Arkansas, during the three decades preceding Oklahoma's statehood, held a combination of subject-matter, territorial, and personal jurisdiction (authority). His court held subject-matter jurisdiction over criminal cases within the boundaries of the Indian Territory—later to become the State of Oklahoma. Within that subject-matter jurisdiction, however, the court held personal jurisdiction over only white and black men accused of crimes. The court, however, held no jurisdiction over red men of Indian tribes within the Indian

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concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." *Id.*

[805] *Conspiracy's* definition, being simple, enables ease in convincing the Jury of the defendant's guilt: an agreement to do a crime coupled with an affirmative step in furtherance of that agreement by one of the parties to the conspiracy, no matter how slight. Under conspiracy, freedom of association translates into crime.

When the Russian communist party saw a person chatting on a street corner with another of whom it disapproved, says Aleksandar Solzhenitsyn, it arrested them both, dragged them before the inquisitors, charged them with conspiracy, and shipped them to a gulag in outer Siberia. Thus, with doctrines of inquisition, at the state's imperious pleasure, association equals conspiracy.

Conspiracy, as now applied, is prone to abuse because the prosecutor need only show mere association between two or more people and throw in a little circumstantial evidence that the two held a common purpose of which the government objects. Moreover, once a single association is established, unending daisy chains of associations at risk to the charge of conspiracy arise. Thus, the government manufactures charges of criminality based upon one's association with a suspect who was associated with someone else, who, in turn, had associated with someone else, *ad infinitum*. Constitutional freedom of association rests upon the common law's fundamental respect for relationships, but exercise of this right has become dangerous.

[806] R.J. UNSTEAD, THE STORY OF BRITAIN 100 (1969). Unstead captures the upshot of the jurisdictional struggle between England's common-law courts and Rome's canon-law (civil-law) tribunals.

Territory that had set up their own criminal courts, each holding exclusive personal jurisdiction over those of their own tribe.

From the time of William I. and through the Reformation, such jurisdictional distinctions between groups of persons was the flash point of contention between England's common-law courts and the Roman Church's civil-law tribunals in England: both claimed exclusive criminal jurisdiction over Roman priests accused of felonies.

Out of this struggle arose the defense called *benefit of clergy*, a remarkable privilege granting "the right of clergyman not to be tried for a felony in the king's [common-law] court."[807] In 1075, pope Gregory VII's overreaching assertions of Roman power first gave excuse for the privilege. Over time, benefit of clergy came to encompass any Roman clerk, from archbishops to alter boys, regardless of how high or low the position of his rung on the gradations of church hierarchy.

Since the definition of *clerk* was unclear—as it is yet today—; and since Latin was the language of Rome's scholasticism, the common-law courts used a Latin literacy test to determine whether an accused man qualified as a clerk. Thus, if the Crown summoned before the King's Bench a man indicted for a felony and he claimed benefit of clergy, the Court gave him opportunity to prove that he was a clerk by handing him a copy of Jerome's Latin text of *Psalm* 51:1. If he read the Latin (or feigned reading it), the Crown forthwith yielded him over to the Church tribunals, where, before his fellow priests and clerks, he stood better likelihood of acquittal.[808] The Church tribunals were happy to exercise power regardless of whether the accused man was a member of the clergy because to do so expanded Rome's civil-law powers at the expense of the common-law courts' jurisdiction.

The benefit-of-clergy defense persisted through the Reformation of the English Church government. This Latin reading test, however, afforded occasion for abuse; within a few centuries, cutthroats throughout England, illiterate but nonetheless resourceful, had memorized Jerome's Latin translation of *Psalm* 51:1—*Miserere mei, Deus* (Have mercy on me, O God)—for ready recitation in the likely event they were given opportunity to pretend to read it before the court. "By the end of the sixteenth century," writes Baker, "as many as half of all men [arraigned on] felony indictments were recorded as having

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[807] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 4 (1982), *quoted in* BLACK'S LAW DICTIONARY 1053–54 (7th ed. 1999).

[808] Both Jerome's Latin Vulgate and the *Septuagint*, designate this verse *Psalm* 50:3; the Hebrew Masoretic text designates it *Psalm* 51:2, but most English versions designate it *Psalm* 51:1.

successfully claimed benefit of clergy."[809] Still, the record reveals that accused men failed the test at the cost of their necks. Thus, ever since, the English courts have called *Psalm* 51:1 the *neck verse*. Through the centuries, however, the common-law courts increasingly denied frivolous claims of benefit of clergy, especially in cases of homicide.

Finally, in 1707, Parliament officially abolished reading of the neck verse in Latin as the test of qualification for benefit of clergy. The common-law courts, in response, maintained their independence, devising other tests for those claiming benefit of clergy. The benefit-of-clergy doctrine continued in the courts of England until 1827 and in the United States until 1855, where an accused man in South Carolina successfully claimed benefit of clergy.[810] The common-law courts of England and America have prevailed in this jurisdictional struggle, now holding jurisdiction over indicted priests, Roman or otherwise.

§ 3.9
The Common Lawyer:
Emergence & Development

The traditional phrase common lawyer, and its shortened form "commoner," denotes one studied in the common law; as distinguished from civil lawyer, and its shortened form civilian, which denotes one studied in the civil law. In any event, to call one a common lawyer neither means that he is common as against uncommon, nor that he is of average ability; neither does calling a lawyer a civil lawyer mean that he is civil as against uncivil.

Before the Norman invasion, Anglo-Saxon England had no professional lawyers because it needed none. Each shire (county), local hundred (township), and manor (farming village) held its own court; parties presented their causes themselves. Legal counsel was unknown. Moreover, in Anglo-Saxon England, the jurors were the judges.[811] Further, the jurors, the parties, and the bailie—keeper of order in the court—were each familiar with the same law and spoke the same

[809] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 587 (1990).

[810] *See* State v. Bosse, 42 S.C.L. (3 Rich.) 276 (1855).

[811] Since the jurymen in Anglo-Saxon England were the judges of the law and the facts, a presiding officer—local baliff, sheriff, hundred (township) supervisor, or manor lord—was needful only to insure that litigants engaged the contest according to good order, i.e., the rules of fair play. No language barrier or even technical legal terms hampered conversation in the Anglo-Saxon courts. Most in those days—including the nobility—were illiterate, but all were *able* to discern right from wrong in judgment of their neighbors or peers. Since common law consisted entirely in unwritten custom and since these customs were strong and pervasive, written law was unnecessary.

language. Therefore, neither the litigants, nor the jurors, nor the bailie needed any bilingual pleader or any translator. Likewise, parties appearing before the Witan (elders) presented their cases in the common tongue: Anglo-Saxon.

Because each county functioned as though a kingdom, there was no appeal beyond the county court. Judges (jurors) and litigants were all neighbors: known not only to one another, but also having common knowledge of one another's lives, families, and affairs. If an elderly widow, small child, or other helpless person was unable to present his or her cause, a family member, or benevolent neighbor, was able and willing to do so. All had direct access to the local courts for redress of wrongs done, all were duty bound to serve as jurymen when called upon, all those fit to serve on the Jury knew and understood the customs in the bailiwick of the court—whether manor village, hundred, or shire—, and all spoke the same tongue. Anglo-Saxon England never needed professional pleaders.

After the Norman Conquest of 1066, however, the need arose for a separate legal profession. Norman-English kings were off on military duty tending their vast holdings in France at least half of their time. Thus, these absentee kings appointed justices to whom they delegated administration of the courts: Norman priests, bearing the strong imprint of Roman civil-canon law and the Romanized Norman law.[812] Moreover, these Norman judges, knowing neither the Anglo-Saxon's common law nor the Anglo-Saxon tongue, demanded all in the courts to speak only Norman French. Consequently, even though William I. had cast off his Romanized Norman law in deference to the common law of the Anglo-Saxons,[813] the Anglo-Saxons and Danes, ignorant of Norman French, were now barred from speaking in court. Moreover, the priests William appointed to the benches of the courts, being ignorant of the common law, were unable to insure common law's fair play. Thus, not knowing Norman French barred the Anglo-Saxons and Danes from the courts.

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[812] Having come under Roman influence in Normandy, the Normans' became efficient administrators. Thus accustomed, the Norman judges, by the prestige of their position, required obedience to their demands of greater court organization and efficiency; but in so doing, eclipsed some of the Anglo-Saxon Jury's prominence. Thus, it remains to the present-day Jury to keep the quiet gravity of its presence and by steady assertion of its authority and power, claim its preëminence in the courts as the master of the facts and of the application of the law.

[813] At the alter in Westminster on Christmas day, following his victory at Hastings of 14 October 1066, William swore his oath to inviolably observe the good and approved ancient laws of Edward the Confessor—the common law of the Anglo-Saxons.

Of about 200,000 freeholders (land owners) in England in 1066—the year of the Norman Conquest—, only 6000 were Norman; the rest were Anglo-Saxons and Anglo-Danes. Therefore, by an overwhelming margin of over thirty-to-one, England's freeman population was Anglo-Saxon and Anglo-Dane. Consequently, most litigants before England's courts spoke Anglo-Saxon, were familiar with the customs of the common-law, and demanded their observance.

To overcome the Norman judges' ignorance of the Anglo-Saxons' tongue and the common law, litigants found, and brought with them into the courts, Anglo-Saxons fluent in Norman French to explain the common law to Norman priests serving as judges. These early bilingual common lawyers accomplished for their clients two purposes: using Norman French, they presented their clients' causes to the Norman judges and informed the Norman judges of the applicable common-law customs, especially *the law of the land*, viz., due process. That the Norman judges were still ignorant of the common law forty-nine years after the Norman Conquest is clear from the promise wrested from King John in Magna Carta: "We [John and his successors] will not make [i.e., appoint] justices, constables, Sheriffs or bailiffs who do not know the law of the land and mean to observe it well."[814]

The gaining back of the Anglo-Saxon tongue in England's courts was slow, but by the fourteenth century, Anglo-Saxon had overcome Norman French, which by then had become a corrupt speech called *Law French*.[815] While the Normans' Law French dominated the courts, the bilingual Anglo-Saxon lawyers had loosed dozens of common-law legal concepts from the Anglo-Saxon tongue and the Norman judges had then inextricably bound up these concepts in Law-French terms and then enlarged their application. Thus, the Normans further developed the expression of many common-law concepts in Law-French terms. As an apple blossom slid into a long-necked bottle grows into an apple inside

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[814] MAGNA CARTA ch. 45. This provision not only requires those administering trials to know *the law of the land* (common-law due process), but also places them in subjection to it. See generally § 5.1.5.3 of this book (discussing the original meaning of Magna Carta's phrase *law of the land*: common-law due process). In addition, this chapter 45 requires, by implication, that those charged with seeing to the observance of due process ("justices, constables, Sheriffs or bailiffs"), must know the fundamental rights of due process and be intent that all respect them.

In the United States, in keeping with this common-law principle as expressed in Magna Carta, if a judge, policeman, sheriff, bailiff, or marshal violates another's fundamental rights of due process (also called constitutional due process), the law deems him to have acted outside the scope of his authority, under color of law only, and liable.

[815] See generally § 3.9.2 of this book (discussing Law French and its part in necessitating the use of common lawyers).

the bottle, preventing apple's removal, budding common-law ideals matured within Law-French terms.

Even now, centuries later, the barrier the Normans brought into the common-law courts—the Norman-French tongue—still separates judges from litigants and jurors: common law remains riddled with Law French, understood by few. Thus, litigants still depend on their lawyers to inform judges and explain to jurors the points of law and its application. In those early days, Anglo-Saxons were learning key terms of Law French and Norman judges were enlarging their knowledge of the common law. English litigants', jurors', and judges' knowledge grew, reaching a zenith during the seventeenth century, in the heat of the Protestant Reformation in Britain, the Presbyterian influence in Scotland and the ascendancy of the Puritan party in England.[816]

Before the Norman Conquest of 1066, common-law courts adjudicated everything except purely ecclesiastic matters. After that date, however, a crossover of ecclesiastic (civil-law) cases to the common-law courts began as William I. sought to break the power of Rome's civil-canon-law tribunals in England. With this transfer of cases, however, also came the ecclesiastic courts' civil lawyers—proctors and advocates—to the common-law courts to plead for their clients using civil-law doctrines.

The proctor was the advocate's clerk. Proctors prepared cases for Rome's ecclesiastic tribunals by doing research, gathering and organizing evidence, and drafting pleadings. Following the proctor's preparation of a case, an advocate presented the case. Among civil lawyers, the advocates drew greater respect than did the proctors because the coveted doctor's degree was required to become an advocate. *Advocate* was the scholastic's Latin term for the earlier Greco-Roman law's *paraklatos*:[817] a

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[816] England's heightened understanding of Scripture from her many translations of the Bible, coupled with her knowledge of the common law, engendered an awareness that the common law's due process protected the privacy, expression, and practice of the convictions of one's conscience informed and freed by the Word of God. Wyclif had earlier taught that the experience of Christian freedom was only possible once the written Word of God saturated one's being and once common-law first principles, largely unwritten, informed one's practical understanding of law and government. Both the Word of God written and understanding of the common law's leading principles became available among the British in the sixteenth century, resulting in the conception and birth of America. The seed of the Word of God conceived America among British Christians, delivered her through water as they crossed the ocean, and tempered her to maturity in the American wilderness. Scripture having laid the foundation in the Colonists' minds, as their resistance against the writs of assistance overflowed the courtroom, so did the habit of thinking in common-law terms.

[817] The Authorized Version of 1611 translates the Greek παρακλητος (*paraklaytos*) with "advocate." *See* 1 *John* 2:1. *Paraklaytos*, in the Greco-Roman tradition of the civil law,

mediator licensed to represent another before a judge.[818] In a word, both proctors and advocates were products of deep scholastic indoctrination, convinced of the civil law's superiority, ready, and willing to supplant the common-law tradition.

This Roman threat to jurisdiction quickened to action England's common-law courts and pleaders. Zealous to defend their turf, they set about to weld themselves into a self-governing association out of which grew the English Inns of Court. These common lawyers' loyalty to the common law ran deep, thus their ambitions were high. They set about to train common lawyers to practice law in the common-law courts and to sit on the bench, while keeping standards of professional conduct and following regular procedures of lawyer discipline—all to counter Rome's university doctors and schoolmen and to keep civil-law's doctrines and its civilians (proctors and advocates) from the English Bench and Bar. By the fourteenth century, however, Rome, ever seeking to infiltrate, had managed to qualify prelates (high-ranking priests), familiar with Rome's civil-canon laws,[819] to practice in the England's three common-law courts: Common Pleas, King's Bench, and the Exchequer.

In summary, before 1066, in England's courts at all levels—from the manor farming village and hundred, to the shire and royal courts, Anglo-Saxon litigants and Anglo-Saxon juries, applying common-law principles, held court in the Anglo-Saxon language with an Anglo-Saxon bailie keeping order. After 1066, most parties coming before the courts were still Anglo-Saxon freeholders, but Norman priests, ignorant of the common law, were judges and allowed only Norman French to be spoken. Anglo-Saxon litigants, responding out of necessity to be heard

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signifies the civil-law attorney: viz., civilian or *advocate*. Those in the first-century Roman Empire most often used *paraklaytos* to denote a family lawyer. In ancient Hellenistic (translated into Greek) Hebrew literature, *paraklaytos* signifies "defense counsel." *Paraklaytos* translates literally, "the one called along side": παρα (*para*) "along side" combined with κλητος (*klatos*), "the called one," resulting in "the one called along side to assist."

The Latin *advocate* is a fitting translation of *paraklaytos*, denoting one called (*vocate*) toward (*ad*) a certain purpose. Field observes from legal documents found among the ancient papyri, the same use of *paraklaytos*: "[O]rig. 'one called in' to support, hence 'advocate,' 'pleader,' 'a friend of the accused person, called to speak to his character, or otherwise enlist the symphony of the judges'." F. Field, *Notes on the Translation of the New Testament* (Cambridge 1899), *quoted in* JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 485 (1930).

[818] As mediator, the civilian's function is akin to that of a priest: he represents another to the sovereign. The common lawyer also fills the role of mediator but adds the role of combatant.

[819] *See* 70 TUL. L. REV. 1139, 1148–49 (1996), *citing* 10 NOTRE DAME L. REV. 357, 365–66 (1935). *See also* MERRYMAN, *supra* note 82, at 11.

and understood by the Norman French-speaking judges and to explain the common law to them, brought to court hearings bilingual Anglo-Saxons to speak to the judge and then to plead their cases.

Thus, was the stage set for the rivalry and competition, struggles and showdowns between common lawyers and civil lawyers, which through the centuries has shaped and strengthened the common-law tradition.[820]

§ 3.9.1
Law French

That Law French was barbarous in its decrepitude does not in the least diminish the value of it to our law when it was full of vitality.[821]

The Norman-French tongue, upon taking into its terms the concepts of the common law, flourished with life abundant and waxed strong as *Law French*. Following the Norman Conquest of 1066, the Normans' already-corrupt dialect of French became the official language of the English courts; Britain's insular isolation from France insured further its corruption. Anglo-Saxon and Dane litigants before the courts then admixed their tongues with the Norman French; as time progressed the "English lawyers took perverse delight in mispronouncing the French."[822] Thus, over time in England's courts, Norman French lost any trace of tame purity it may have retained after the Normans began using it, the English dubbing the enlivened outcome *Law French*.

The tongues of men, however, never dead where spoken, are as alive as those speaking them. Within a century and a half of the Normans taking control of the common-law courts, the force of the mixed Anglo-Saxon and Danish tongues (later called English) began its reentry into the courts and government, recapturing preëminence. By 1362, the common-law courts, recognizing the natural power of the English language in the courts, forbade the use of Law French; the following year, 1363, Parliament, for the first time, opened with a speech in Anglo-Saxon (early English); by 1372, the English Bar had stopped speaking Law French, even among themselves.[823] Law French, nevertheless, persisted as a kind of legal shorthand; English lawyers, though never speaking it, continued use of key Law-French terms: between 1066 and about 1366,

[820] Within 100 years of the Norman invasion, the jurisdictional struggle of the common-law courts with the civil-law tribunals festered and broke out between Henry II. (reigned 1154–1189) and Thomas Beckett.

[821] PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 14 (1925).

[822] ROUNDS, *supra* note 363, at 626.

[823] *See* BOBRICK, *supra* note 316, at 52.

the precise meanings of common-law concepts had become inextricable from the legal-weave of their Norman-French words.[824] Law French survives in writing, but after the year 1372, claims Baker, "[t]he only French heard in [English] courts . . . was the *oyez* of the crier."[825]

Baker, however, overstates his case. Common-law courts still use Law-French terms, oral and written. For example, many of the following Law-French words are familiar to lawyer and non-lawyer alike: plaintiff, brief, lien, petition, alienation, estopple, escheat, cy pres, cetui que use, siegneur, seisin, disseisin, livery of seisin, ouster, distraint, distrainer, dehors, serjeant, mens rea, actus reus, pur autre vie, petit, constraint, in limine, chattel, kidnap, demurrer, and defeasance, to cite a few. Some of the foregoing Law French terms—such as *brief*, *plaintiff,* and *kidnap*—have achieved permanence in everyday English. Other words, thought to be Law French, are often from Latin or even regular French roots: *appeal*, for example, though traced to the language of the ancient Franks, is neither a Norman-French nor a Law-French word. As did the earlier common lawyers, present-day common lawyers still mispronounced the Law French, though seldom on purpose or with perverse delight.[826]

§ 3.9.2
Character of the Common Lawyer

Before the fourteenth century, common lawyers called themselves *Servientes Adlegem* (Latin for "Servants at Law"). Then, during the fourteenth century, about the time common-law courts ceased using Law French, common lawyers began to call themselves by the English term for feudal serjeanty: *Serjeants-at-Law*.

Servientes Adlex—Latin for feudal serjeantry—was a title of honor denoting a personal service (*Servientes*) rendered in the presence of (*Ad*)

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[824] *See* ROUNDS, *supra* note 363, at 626. As common-law ideas came to be bound up in Law-French words, so also biblical teachings remain bound up in the Latin tongue. The leaders of the Reformation, having been educated in Rome's universities, understood Christian truth in Latin terms. Christian people struggle to grasp the meanings of biblical ideas locked in Latin words. Present-day Protestant learning carries the baggage of Latin theological words. As are Roman numerals, the Latin language is old, a bit feeble, and cumbersome: as is doing arithmetic using Roman numerals, so also is the use of Latin to explain biblical concepts to most all God's saints. Law-French and Latin have served in the providence of God. It is also in His providence that men forevermore speak God's words and teach God's standards, using the lively words of their common tongues.

[825] J.H. BAKER, MANUEL OF LAW FRENCH 1 (2d ed. 1989), *quoted in id.*

[826] *See generally* Sweet, *Cestui Que Use: Cestui Que Trust* 26 L.Q. Rev. 196 (1910) (discussing common-law borrowings of Norman-French words), *cited in* ROUNDS, *supra* note 363, at 164.

the king (*lex*): thus, a holding of land (tenure) in exchange for a specific personal service that the holder must render direct and only to the king. Common lawyers then replaced the Latin *Servientes Adlex* with English: *Serjeants* replaced "Servientes" (servant), *at* replaced "ad" (with or toward), and *Law* replaced "lex" (king): thus the title, Serjeants-at-Law. The early common lawyer's archaic use of the preposition "at" is scarce nowadays, but was customary in the fourteenth century. Common lawyers intended "at" to denote that their calling was an immediate, peculiar, and personal servitude *to the common law*, as distinguished from a personal servitude to the king. In short, Serjeants-at-Law were to the common law what *Servientes Adlegem* were to the king. Thus, to understand the meaning of the title Serjeant-at-Law, one's understanding of the feudal title *Servientes Adlegem* is needful.

One's personal service to the king (*Servientes Adlegem*) was honorary, such as bearing his sword and armor or serving as his champion in battle. Likewise, the Serjeant-at-Law's duty and loyalty was personal and honorary, but to the majesty of the common law. In addition, this is why modern common lawyers refer to litigation in common-law courts as an action *at* law—*law* being the abbreviated term for "common law" and the prepositional phrase "*at* law" meaning "*in the personal presence of* the law's majesty," just as *Servientes Adlex* meant "in the personal presence of the king's majesty."[827]

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[827] *See generally* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 12–13 (1962) (discussing Serjeanty tenure, and the meaning and etymology of the term *Serjeanty*). John Wyclif's translation of *John* 1:1–2 further demonstrates the use of the English preposition *at*, as Englishmen understood it in the early days of the Serjeants-at-Law, in the late fourteenth century: "In ye [the] bigynyng was ye word ȝ [Middle English (Mercian) conjunctive sign "and"] ye word was *at* god • and god was ye word • yis [this (one)] was in ye bigynyng *at* god . . . ." (emphasis and separating dots added). Jerome's Latin Vulgate text, from which Wyclif translated, renders John's Greek preposition προς (*pros*) with *apud*, meaning "at," also indicating personal closeness, both of space and soul. Wyclif, therefore, uses the English preposition "at" to express the inextricable and infinitely intimate relationship between God the Father and God the Son ("ye word"). Another example of this use of the preposition *at*, having persisted from the fourteenth century to modern times, is the maritime office titled "master *at* arms."

Until at least the middle of the eighteenth century, the common-law courts retained the foregoing understanding of the preposition "at." For example, the court order in the Matson case cited above has, "*at* this day comes the plaintiff by his attorney and on his motion orders that this cause be dismissed *at* this plaintiff . . . ." *In the Matter of* the Petition of Jane Bryant, Mary Jane Bryant, Mary Katherine Bryant, Sally Ann Bryant, and Robert Noah Bryant—Persons of Color, on application of "*Habeas Corpus*" for freedom, Coles County, Illinois Cir. Clerk Records for Oct. Term 1847, p. 196, bk. 2, *discussed in* § 3.7.12.1 of this book.

Fundamentally, prepositions such as "at" define the relationship of an object's position *vis à vis* the position of another object. For this reason, prepositions are arguably the most telling part of speech, not only in the English language in general, but especially in the

Moreover, by the title Serjeant-at-Law, common lawyers intended to contrast themselves with the Roman priests serving as civil-law proctors, advocates, and judges. The Roman priests, by their oaths, had sworn to render their direct loyalty and service to the pope of Rome; whereas the common lawyer's oath, loyalty, and service were direct to the common law. Unlike the loyalty of the Roman priest and the civil servant, which was to a government of a single will—whether pope, bishop, king, or any combination of men—, the common lawyer's undivided loyalty was to the principles of the common law. He was to seek commonness with other men upon the objective foundation of law's truth and never upon the subjective and shifting sands of earthbound rulers, subject, as they are, to fickle, arbitrary viewpoints. The common lawyer was to be in constant pursuit of the eternal law's articulation of truth, believing that, if he keeps on seeking, he will discover, discern, and refine the law's fitting application.[828]

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common law's determination of *relationships*—the controlling question in common-law conflict and litigation. Definition of legal relationships as a predicate to determination of rights, responsibilities, and liabilities is a fundamental distinction between common law and civil law. In the instance of *John* 1:1, "at" defines the relationship between God the Father and God the Son to be that of inextricable intimacy. In like sense, "at" also defines the relationship between the common lawyer and the common law.

[828] *See Matthew* 7:7–8: "Keep on asking and it shall be given to you. Keep on seeking and you shall find." This is the Savior's admonition concerning understanding and applying the Scriptures as the law of God ("Do not think that I have come to destroy *the law* . . . ."), the theme of His Sermon on the Mount. All of the Scriptures concern Christ as the living law. See *Luke* 24:27, where Luke states that Christ, "beginning with Moses, then from all the prophets . . . thoroughly explained to them in all the Scriptures the things concerning Himself." This verse does not say, as some have thought its grammar allows, that Christ expounded "all the things concerning Himself in the Scriptures," as though the verse does not demand that *all* the Scriptures reveal Jesus. Christ then, in verse 44, provides His definition of "Scripture" by citing its three divisions: the Law of Moses, the Prophets, and the *Psalms*, saying that these all concern Him. Christ is *the* Word and *the* Truth (*see John* 1:1, 14:6), and every scintilla of Scripture conveys knowledge of Him. *See John* 17:17b.

Christ's encounter with His disciples on the road to Emmaus also reveals that man's entire ability to consistently accept the conclusions of reasoning (*διανοι: dianoia*) are dependent upon God. *See Luke* 24:45. Following these ideals, the common lawyer will be nobler because even where good men disagree, his final appeal to truth is never to mere fallen men: viz., scholars or legislators, priests or councils. Rather, it is to the written and eternal Word of God: the way pointed out by his Creator.

The Hebrew תורה (*torah*), is often rendered *law* for lack of any single equivalent English term. See generally app. 3 of this book and accompanying notes, for further explanation of תורה (*torah*): the Hebrew term for *law*. To think as a traditional common lawyer is to seek the law and its application in the way the Creator has pointed out.

Adhering to divine revelation, discovering its proper application, and ordering relationships accordingly entail a biblical mindset. The reformers neatly compressed the principle: men, as all of creation, are products of the Word of God; the Word of God is never the product of mere men. It follows, therefore, that the final appeal from all human courts remains an individual responsibility of conscience to God's Word. To hold otherwise is to attribute some aspect of deity to the state. Because all mankind is subject to God's law,

Only Serjeants-at-Law held the title *Order of the Coif*, the sign of right to appear for their clients in the royal courts. A candidate's entry into this Order required approval of the Chief Justice of the Court of Common Pleas. The chief badge of the authority bestowed by the Order of the Coif was a tight-fitting cap worn on the head. In symbolic deference to the Order's loyalty to the common law—recognizing that the common lawyer's service was direct to the common law and not the person of the King—English kings allowed members of the Order of the Coif to wear these caps in their presence. Until 1553, as did monks, Serjeants-at-Law rode mules instead of horses. By their habits, customs, and lifestyle, the early Serjeants meant to show that their devotion to the common law was as strong as—if not stronger than—the priests' loyalty to the Roman pontiff.

Therefore, by their title Serjeants-at-Law (hand servants to the common law) and by their oath, common lawyers were foremost for the benefit of the people and not the state.[829] As the common law's hand servant, the common lawyer was to aid the common law in defending the people's rights and freedoms, just as the king's armor bearer was to serve as the king's right arm in vindicating his people's God-ordained rights and freedoms. By the same principle, American lawyers swear their loyalty oath to the principles of common-law and government written in the Constitution, and never to any man or combination of men in government, viz., the state.[830]

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when mere men attempt to stand in judgment over God's law, the tables immediately turn, and God's law stands in judgment over them. From this perspective, the common lawyer is to view the world of men and their relationships.

[829] God has not made people for the benefit of the law ; but rather, God has given the law for the benefit of His people. Such was Christ's declaration of this elemental principle respecting the law of the Sabbath. *See Mark* 2:27.

[830] The principle remains; an attorney *at* law is a lawyer in the personal service of the common law for the benefit of the people. The common-law tradition is about discovering the law's true articulation and application by following, with circumspect, due process and fair play. The courts observe due process confident that through it, truth will emerge. Moreover, truth's emergence begets liberty, setting men free.

Those adhering to the personal service of *the* Truth—as Jonathan's armor bearer adhered to Jonathan during Jonathan's single-handed assault against the Philistines—will share in Truth's victory. "Look!" said Jonathan's armor bearer, "I am *with* you, as though [I were] your own heart." Because Jonathan's armor bearer hung closely on Jonathan's skirts as Jonathan assaulted the Philistines—climbing up "on his hands and on his feet" as the enemy fell before Jonathan—, Jonathan's "armor bearer completed it [the victory] following him." Such is to be the devotion pursued by common lawyers toward the law as attorneys *at* law: true law quells even the mighty, and those that follow hard behind it deliver the final blows, completing the victory. *See* 1 *Samuel* 7:4–14. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (calling the prosecuting attorney "the servant of the law").

After the year 1600, the only way to gain eligibility for an appointment as judge in England's courts was to first become a Serjeant-at-Law. Thus, judges and Serjeants were peers in fellowship, calling each other "brother" and living as neighbors on Fleet Street and Chancery Lane. In the English order of peerage, Serjeants-at-Law ranked just below knights, but just above esquires (a knight's assistant), though some Serjeants, having become a judge, were knighted. Further, *Serjeants*-at-Law (most often spelled with a "j") are distinct from *Sergeants* (spelled with a "g"): those holding lands by tenure of military service. Both *Serjeants*-at-Law and *Sergeants* (landed freeholders by military tenure) ranked below knights. In the United States, some append the title *Esquire* after the name of American common lawyers as an abbreviated title of courtesy, i.e., *Esq*. The term so used, however, signifies neither class nor peerage; moreover, the Constitution bars both the United States and any of the several states to grant any such title.[831] In any event, the title *Esquire* for a lawyer is a misapplication in light of history: English barristers held the title *Serjeant*, never Esquire.[832]

In addition to their tight-fitting caps to distinguish their position, until 1694, Serjeants-at-Law wore robes varying in color, but always of the same cut. The Serjeants' robes influenced John Jay to begin the United States Supreme Court's justices' custom of wearing robes. Many

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[831] As some have suggested, American lawyers do not hold titles of nobility because they have neither authority to receive or to hold them: the Constitution denies this possibility. Any assertion that such a title has been lawfully bestowed is mistaken, absent the consent of Congress. Further, the Constitution bars any of the several states or the federal government from granting titles of nobility:

> No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.
> [and] No State shall . . . grant any title of nobility.

U.S. CONST. art. I, § 9, cl. 8; § 10, cl. 1.

It is a matter of custom, and not recognition of nobility, that Americans address their judges with *Your Honor*, and that they sometimes reference American lawyers with *Esquire*. Moreover, Scripture and history make clear that titles of nobility neither render men noble nor insure their honor—the decrees of princes and the enactments of legislators notwithstanding. Only God, by the power of His Word, can make a reality those things that are *not*. Further, one does not inherit nobility from one's earthly ancestors; rather, God, not earthly kings, bestows true nobility directly upon the individual. Such is the foundation of the American conviction as enshrined in our Constitution. For the Christian, true nobility can only come by the believer's position in Christ. Those specifically called of God are seldom noble by earthly standards (*see* 1 *Corinthians* 1:26), but upon God's effectual call, He ennobles them to pursue true nobility. *See Acts* 17:11.

[832] *Esquire* is Norman Law French. The English later shortened "Esquire" to *Squire*, and have abbreviated it *Esq*.

American state courts, such as those of Kentucky and Missouri, resisted judges' wearing of robes until well-after 1900.[833] In his prologue to *Canterbury Tales*, Geoffrey Chaucer—believed to have been a Serjeant—provides a fourteenth-century description of the Serjeant-at-Laws' dress and manners.

§ 3.9.3
Inns of Court

Though the imperial spirit of the civil law fueled
the destruction that Nazi bombers rained upon the
English Inns of Court, "no intellectual force," said Justice Jackson,
"more consistently and uncompromisingly resisted the lawlessness
and absolutism of Hitler than the spirit of the common law
which radiated from those landmarks."

Through the centuries, the common law has made its own way, keeping its integrity apart from the civil law's schoolmen, scholastic doctors, and universities. Between 1164 and 1300, in an effort to organize and preserve the ancient Anglo-Saxon customs of law and government, formal common-law learning grew up in London at the Inns of Court,[834]

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[833] The Serjeants' wearing of robes was most likely—as was their riding only of mules and living in monastery-like dormitories—a visible statement that their loyalty to the common law was as strong or stronger than that of the robed Roman priesthoods' sworn loyalty to the pope. The present style of robes worn by the Roman priests dates, it is said, back to the early reign of Constantine in Rome.

According to legend, by the time Constantine conquered Rome, Rome's judges had become unavailable to decide disputes, frustrating the Romans. Upon becoming emperor, Constantine saw that by providing easy opportunity for the Romans to have his judges decide their suits, his popularity would grow. Thus, having made himself head of the Church, he ordered his priests to wear their priestly robes at all times, making themselves easily noticable, on the streets or elsewhere, by any in need of a judge to decide a matter. Constantine then made it known that he had empowered his priests to render judgment. If both parties in a dispute stopped a priest on the street, he was to listen to their cause and render judgment as soon as possible, and if feasible, then and there.

[834] Significantly, the common law's Inns of Court arose during the reign of Henry II. (1154–1189) and had grown to maturity by the end of the reign of Edward I (1272–1307). The policies of these two men, more than any other English kings, encouraged the use of the common law in England and established its permanence in the forms we now enjoy.

Henry II.—short of stature, bowlegged, red headed, of unflagging health and energy, and ever concerned about becoming overweight—began the process of arranging and defining the customs and processes of the Anglo-Saxon tradition of common-law self-government in every borough and shire. The organizing vigor of Henry II., kept the common-law tradition from failing, and enabled it to withstand under the coming encroachments and overt assaults of Roman law.

Edward I.—long of limb, black headed, drooping left eyelid, of stammering speech, and beleaguered from his youth to his grave by never-ending war—labored and fashioned into solid form the constitutional machinery of common-law limited government. Seeing the

which, along with the common-law courts, guarded, with righteous zeal, against canon and civil-law influence and infringements. For example, in 1164, royal courts barred priests and monks from practicing before them.[835]

The English Inns of Court comprised brotherhoods of teachers and students, living together in monastery-like dorms and eating together in a great hall, where *readers*, *benchers*, and *barristers* sat high up at one end of the hall; and students or *moot men* sat at the lower opposite end. The Inns trained and taught common lawyers in the traditional arts of freedom (*artes liberals* or liberal arts)—i.e., languages and language skills, viz., reading and writing, listening and speaking—for deft use of these tools before the common-law courts.[836] In addition, the Inns offered optional courses, including arts of battle, such as fencing and the use of firearms. The Inns also formed their students into militia units for the common defense.[837]

The Inns required eight years as a student or *moot man* to become eligible for admission to the Bar. Students entered an Inn of Court at age fifteen and practiced his skills in moot court for eight years. Moot court was akin to trial competition now held in law schools, except students in moot spent most of their time learning to hammer out pleadings—still an arduous phase of litigation. Pleading is the process used to define and refine the elements of crimes in criminal matters, and to narrow and whittle away irrelevant matters in civil matters. In those early days,

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common law and its courts as the means of relieving the unlawful financial oppressions of Rome's imperial church and the feudal barons' heavy handedness, Edward sought to constitutionally limit the priests and the barons, while insuring to all ready access to the common-law courts.

[835] The civil law reacted to counter the common-law Inns of Court by organizing their own Inns of Chancery. Nine houses were established where students studied to become civilian attorneys or judges in Chancery or to gain entry into the common-law Inns. Because the Inns of Chancery never exercised discipline over their members, as did the Inns of Court, they became no more than dining clubs; by the nineteenth century, they had come to nothing.

[836] Traditional education in the *arts of liberty* aims at preparing the student to exercise discretion in direct responsibility to God. By contrast, training in the *arts of servitude* aims at preparing the subject to accurately obey the discretion of another. *Discretion* is the freedom and authority to discern and decide, responsibly and intelligently. To the sons of God—those who have received the divine nature by their divine conception and birth—, Christ has granted the authority of discretion to discern and apply His truth. God has made possible for His own, true discretion. Hirelings and slaves, not being sons of God, being without the new nature, retain only their old nature; and consequently, are bound to act in accord with it; true discretion, therefore, is impossible.

[837] See generally § 3.10.5 of this book, citing the response of the Inns of Court to the Bonaparte's planned invasion of England.

lawyers carried out most arguments necessary for trial at pretrial hearings, before the actual trial began.

Pretrial litigation aimed at honing issues remains the practice in modern common-law courts. Stating a cause of action that alleges facts fulfilling a cause's requisite elements, was, and remains, indispensable. Even today, after starting a complex case, pretrial litigation can take two years or longer before the parties have whittled down the issues of the case, allowing focused consideration of the Jury at trial. Traditional common-law litigation, then as now, begins with an accusation, accelerates through pretrial pleadings to a crescendo, and upsurges in an oral trial of rapid and well-placed exchanges of testimony and tangible evidence, followed by jury deliberation to determine the facts and then to apply the law as it sees fit. Because the Jury are the masters of the facts of the case, and the facts determine the right application of the law, common lawyers then—as now—called the trial court the *trier of fact*.

If, after three or four years as a student, a candidate demonstrated called-for ability in the moots or practice courts, the barristers called him to be a *reader*: one charged with reading and teaching common law, as does a modern junior associate professor. The Inns of Court knew that reading and teaching the common-law principles to others trained the reader's mind to order his thoughts and method as a common lawyer,[838] and heightened his sensitivity to the demands of due process. Until well into the twentieth century, reading law remained the accepted method of learning the common law.

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[838] The Inns of Court, consonant with Scripture, saw teaching as a method of learning for teacher and student alike, but even more so for the teacher. Likewise, the Old Testament presents teaching as intense learning. The doubled middle character of the Hebrew verb למד (*lammadth*), meaning, "to teach," reveals that the Semite understood teaching to be an intense kind of learning. Most Hebrew verbs are trilateral (three letter) roots. If, however, the writer or speaker desires to deepen, strengthen, or expand a verb's meaning, he needs simply double the middle consonant. Thus, the Hebrews expressed the concept "to teach" by doubling the middle consonant of the verb למד (*lamadth*), meaning "to learn," which becomes למד (*lammadth*): literally, "to learn intensely," with the resultant meaning, "to teach." To the Hebrew, teaching was intense learning. One learns beat that which one conveys, whether by doing (by example) or by speaking.

To save costs, in the ancient times of expensive parchment and no printing presses, the Hebrew scribes, or סופרים (*sopherim*)—literally, "counters" of the number of each Hebrew character of the Hebrew alphabet in each copy of each book copied, in order to insure accuracy—, signified the doubling of the middle character of verbs, not by adding a letter, but by placing a dot called a Daghes Forte in the heart of the consonant doubled, excepting the four Hebrew gutturals—ע, ח, ה, א, and ר—, in which case the scribe's desired intensity is reached by lengthening the preceding vowel. Thus, by inserting the dot, the intensified four-letter verb pronounced למד (*lammadth*: to learn intensely or teach) stays short with only three letters (למד), demanding less parchment. Hebraists call this dot, the *doubling dot*.

As to method, *reading law*[839] is simple, entailing reading and pondering until the mind renders simple the pleadings and case opinions of the common-law courts and treatises of learned lawyers concerning common-law subjects.[840] Reading law relies on the adage drawn from experience that any subject becomes simple, once a fellow understands it. Indeed, upon first approaching the common law, the reader is daunted, but with steadfast reflection, the simplicity of its first principles, like a beautiful landscape, emerges and forms into view.

Justice Joseph Story of the United States Supreme Court spoke of his experience as a young man reading law, whereby, after much struggle and mental anguish to the point of tears, he broke through the seeming tangled barrier of cases and saw the stable integrity of the common law. At the beginning of his readings, however, he saw unnumbered case precedents as though puzzle pieces scattered about. As did Tennyson, young Story saw the common law as "[t]hat codeless myriad of precedent, that wilderness of single instances . . . ." Thus, reading and teaching at the Inns of Court, challenged the reader to conquer the wilderness of the common law's single instances by getting an eye for the unchanging first principles threading through them. Learning law is as learning Scripture; it requires no knowledge of some secret method: simply stated, a person must read, ponder, and ruminate.

Because the common law is not a list of laws but, rather, a fact intensive tradition holding fast to due process, the Inns of Court honed the mental senses by reading and oral expression. Though common-law legal training still encourages both skills, in those early days at the Inns of Court, common lawyers whetted oral skills more than is done today. Nowadays, the written brief supplants the oral argument, while the oral argument has now become, in function, the written brief. By sharpening his reading and writing, the reader also sharpened his ability to listen, to speak, and to think: reading and speaking skill quickens listening skill, enhances writing skill, sharpens thinking skill, clarifies one's resolve, and deepens one's well-placed loyalty.

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[839] The phrase *reading law* is vestige language from the Inns of Court. Just as methods and forms of education will never insure knowledge of the Bible, formal education obtained or Bar exams passed will never insure one's grasp of the common-law first principles. To move beyond knowing about the common law and into knowing the common law, one must simply and persistently read the common law. Knowing about the common law is an intellectual matter; knowing the common law is a personal matter that impresses upon one's entire being the majesty of the law.

[840] See generally § 5.3.3 of this book (discussing the distinct subjects of the common law as separate facets).

By age twenty-three, having served well for a few years as reader, and while still practicing as a moot man, the Bar called to the reader to become a *barrister*. Then, by age thirty-five, after practicing as a barrister for twelve years, and while continuing to serve as a reader, the Inn (in its discretion) selected the barrister to become a member of the governing body of the Inn of Court called a *bencher*. From the benchers, the Inn appointed its treasurer, a position of great trust because the treasurer held the Inn's funds. Sir John Fortescue, while a bencher, served as treasurer.

After ten years as a bencher, the barrister became eligible for selection as a Serjeant-at-Law; reputation was important. Once the Serjeants-at-Law selected a barrister to become a Serjeant candidate, his appointment must await approval of Chief Justice of the Court of Common Pleas. Once approved, the selectee moved to another building nearby called Serjeants' Inn, returning to his former residence at his Inn of Court only as an alumnus on special occasions—after thirty years of learning, through study and practice, the principles and process of the common-law tradition.

Only Serjeants-at-Law were qualified to become judges. If, for example, the Serjeants appointed a bencher to the position of Serjeant-at-Law at age forty-five, he became eligible for the Crown's appointment as King's Serjeant, and possibly a judgeship, around age fifty-five. In the traditional requirements of the Inns of Court, a lawyer, therefore, never argued causes before the courts until he was, at the least, over age forty, or sit as judge until at least past age fifty. To keep one's full-fledged membership at an Inn of Court, one must have completed twelve terms of study and dine or sup at least twenty-four times a year at the Inn of one's days as a student.

From the fourteenth century and into the seventeenth century, royal courts sat in the morning from eight to eleven; the High Chancery Court sat from nine to eleven. Upon close of court at eleven, benchers, barristers, and moot men each returned to his Inn of Court for dinner. In the afternoon, judges took their leisure and Serjeants often met to fraternize.

During the years 1290 through 1535, each courtroom had a bench in the back for students. The only available records of cases from this 245-year period are students' notes made while sitting on these backbenches. In addition to these students' notes of real cases, records of the students' moot cases found their way into official reports. Consequently, some recorded cases from that period, purporting to be official, are only students' moot-court case notes. Before about 1535, lawyers made almost

all arguments over questions of applicable law and admission of evidence in their clients' cases through pretrial pleadings and oral argument. Thus, all that remained necessary for trial was proof of facts before the Jury. Consequently, the records of trials proper held from 1290 to 1535 show the methods of presentation of evidence before the Jury in the common-law courts, but little else.

The common law's Inns of Court recognize their current of influence into American law and government and their shared tradition. Today, displayed on the wall of Grey's Inn, hangs a portrait of James Kent, past Chancellor of New York State. English barristers know James Kent as America's Blackstone. Blackstone has influenced American common-law and Kent has influenced English common-law. The Inns of Court trained those men whose convictions won over the American colonial Bar to the cause of American independence. The English Inns still train students from former English Colonies. The Inns of Court, through the colonial common lawyers they produced, rooted the traditions of the common law in the American Colonies that have shaped and safeguarded America's law and government, from her inception to her maturity.

Because the English Inns' method of teaching the common-law tradition worked well, it warrants consideration. Unlike the civil law's exclusive emphasis upon veneration of the trained mind and theory, the common-law tradition, untrusting of any part of humanity, including the mind, stresses the entire being of every participant in the courts and government. Whereas the civil law is largely written, nonpublic, secret, non-confrontational, and tends to confine its regard to the Code by abstracting the facts from consideration; common-law trials are largely oral, public, open, confrontational, concrete, and fact intensive. Acutely aware and zealous of these differences, the English Inns of Court fashioned the teaching of common law accordingly.

Public and oral trial before the Jury being the graveman of the common-law tradition, the Inns began the student's learning during his teenage years by encouraging speaking skills through watching and listening to real court battles and by practicing in moot trials. In so doing, familiarity with the common-law of evidence—a time-consuming area of the common law to master—was unavoidable at the early stages of his learning. At the same time, the student, by working and reworking pleadings, learned clear writing, clean of the needless. "Writing," said Bacon, "maketh a man exact." In order to write clear pleadings, students must first learn to think clear thoughts. By this plan, the honing of listening, thinking, and writing skills came before reading. Only after three or four years as a student, having learned to listen and write; and as

a moot man, having proved his ability to speak well, was the student called to read law, while orally teaching that which he is learning from his reading.

The Inns of Court, in teaching the common lawyer, distinguished the rights of due process from the scholastic goals with which the universities indoctrinated their civilians. The scholastic doctors cloistered themselves in the abstract confines of the classroom and trained their students to confirm the status quo of *the powers that be* by limiting their consideration of law to the imperial Code.[841] By contrast, the common lawyers taught their students by requiring them to observe real cases and controversies in the courts, while between times, they argued in the moots. Thus, the student sharpened the law to his mind, while honing his language skills of listening, writing, speaking, and reading. His training thereby encouraged him to enlarge the application of common-law causes of action with wise discernment.

The Inns of Court forged the agile strength of the common-law tradition in the lives of their students. By the fourteenth century, through real cases and controversies, the customs of the common law had worked into written records of the common-law courts; lawyers began calling them first principles. In addition, respect for the majesty of the law, practical due process, and fair play had become second nature to those taught at the Inns of Court.

Only four Inns of Court remain in England: Inner Temple, Middle Temple, Lincoln's Inn, and Grey's Inn, all lying near one another and the River Thames. In 1603, the Inner Temple split from Middle Temple, but still shares the same Chapel. Until Nazi bombing destroyed the Temple Church, Middle Temple Hall was a fashionable place. In 1602, Shakespeare's play *Twelfth Night* opened there. In 1606, England's common lawyers purchased the buildings that became Lincoln's Inn and Grey's Inn.[842] Of the four remaining Inns of Court, only the building of Lincoln's Inn emerged from the ruin of Nazi bombs. Following World War II—with the financial help of the American Bar Association—English barristers rebuilt the Inns of Court damaged by Nazi bombing.

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[841] See generally app. 18 of this book (discussing the phrase *the powers that be* and William Tyndale's use of the phrase in his translation of *Romans* 13:1–7).

[842] From 1530 to 1540, the Crown seized Roman Church property in England, closed the monasteries, and, of properties not seized, forced payment of rent to the Crown. Then, during the seventeenth century, the English barristers purchased some of these confiscated buildings from King James I. *See* 46 A.B.A.J. 616 (June 1960).

§ 3.9.4
Early English Bar Divisions

In the United States, the legal profession is undivided: largely, those licensed to argue cases before any court are qualified to seek admission to argue before any other court. The legal profession in England, on the other hand, is structured: some called solicitors or instructing solicitors, receive clients and prepare pleadings; others, called barristers, represent clients before courts.

By the year 1800, the English legal profession had separated into three divisions: serjeants-at-law, barristers-at-law, and attorneys-at-law—also called solicitors in Chancery. By the year 1900, the profession remained in three divisions, having added the office of King's Counsel, known formally as *Counsel*; known informally as Barrister or Solicitor.

Of the three divisions, the attorney-at-law was the least privileged, being authorized to try cases only before justices of the peace, but not before the three superior courts: the King's Bench, Court of Common Pleas, and Court of Exchequer. However, three years as an attorney-at-law qualified a fellow to practice as a barrister-at-law in any court except the Court of Common Pleas,[843] where the serjeants-at-law maintained an absolute monopoly from 1300 to 1845. The serjeants' monopoly was lucrative because the parties of most cases coming before the Court of Common Pleas were wealthy landowners wrangling over rights in land. During this entire 545-year period, there were only about 1000 Serjeants-at-Law; seldom were there more than fifteen at any one time.

Other lawyers hankered for a share of the serjeants' lucrative law practice before the Court of Common Pleas. Consequently, using fictions,[844] non-serjeants (barristers and attorneys) sought to enlarge the jurisdictions of the other two courts (King's Bench and Court of Exchequer) at the expense of the Court of Common Pleas. For example, barristers and attorneys split legal hairs, distinguishing such concepts as

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[843] An attorney-at-law's three-year probationary period before allowing him to become a barrister-at-law remains the requirement, in principle, of the United States Supreme Court: any lawyer, before appearing before the Supreme Court, must have been licensed to practice before a state or territorial court for at least three years.

[844] Civil law is fraught with fictions; common law uses them to a lesser degree; Jeremy Bentham, while acknowledging their utility, was indignant toward their use; William and Blackstone, however, saw them as necessary tools. Used freely in Roman pleadings as *fictio* to obtain jurisdiction otherwise unavailable according to law, civil law views fictions as necessary to evermore expand its reach. A legal fiction is a false averment such as, for example, a plaintiff's averment that the defendant is a Roman citizen, when in fact he is not. *See* MAINE, *supra* note 639, at 21.

possession of[845] land (occupancy) from title to land (ownership), and built the action of ejectment[846] on a theory of criminal law. By such distinctions, the attorneys and barristers encroached the jurisdiction of two other courts' upon the Court of Common Pleas' jurisdiction over real property matters, weakening the Serjeants' lucrative monopoly.

§ 3.9.5
Solicitor & Barrister

Before 1700, serjeants-at-law (highest ranking barristers) dealt direct with their clients; after 1700, only solicitors interviewed clients and narrowed the issues of a case, after which the solicitor chose a barrister that specialized in the field of the client's case to argue it before the court. Nowadays, however, the solicitor prepares a brief and performs all groundwork research for the barrister. He also endorses a suggested fee for the barrister, whose chambers are often in an Inn of Court. The foregoing arrangement of relationships among the barrister, the solicitor, and the client is all a matter of custom, unaddressed by any positive law.

Respecting the trial of any given case in English courts, barristers for each party fill two positions: *junior* and *leader*. Neither term signifies age or experience, but only to the barrister's role respecting that particular trial. The junior barrister, upon receiving the solicitor's brief of the case, gives it to his apprentice, a licensed barrister known as his *devil*.[847] The devil then interviews witnesses and works up a trial brief. The leader and the junior divide the trial work in the same way trial lawyers in the United States often work as co-counsel, one being lead counsel. The solicitor and devil never take an oral part before the court, arguing or

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[845] *Seisen* is mere occupancy (possession), not ownership (holding of title). This common-law principle has crept into Scotland's civil law as *sasine*. Seisen, however, carries with it more rights than mere possession or temporary use, such as that which attaches to a tenantry or life estate. Americans have called seisen *glorified squatting*, which, if done long enough and notoriously without interruption, will enable the squatter to obtain ownership in fee through "that strange and wonderful" common-law teaching, adverse possession. *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 87–88 (1962).

[846] *Ejectment* was an action at common law that enabled a landowner to recover possession and occupancy of his land. In order to prevail, the plaintiff had to prove that the title was his, that his ejection was wrongful (he was forced from his land), and that he suffered damages. *See id.* 90–91.

[847] The apprentice barrister's title *devil* is unrelated to the civil-law title *devil's advocate*. The Roman Church appoints the devil's advocate to argue against the proposed canonization into Roman sainthood of a deceased person at an official proceeding set for that purpose.

questioning witnesses, but assist in other ways, such as brainstorming strategy and working up good questions for cross-examination.

Barristers and solicitors are not traditional social peers and, thus, fraternize little. Unlike the solicitor, the English barrister holds the title *Gentleman*. Recent legislation of Parliament, however, is breaking down such artificial distinctions.

In summary, the English Bar divides itself between barristers and solicitors. It is an intelligent partition of work, assuring work well done. The English Bar's division of work has fostered high standards and able practice before the courts.[848]

§ 3.9.6
Chancery & Equity Practice

[L]aw, without equity, tho' hard and disagreeable, is much more desirable . . . than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would be almost as many different rules of action laid down in our courts as there are differences of capacity and sentiment in the human mind.[849]

The early English Courts of Chancery held equity jurisdiction and were wholly separate from the common-law courts. Originally, a priest called the Chancellor presided over subordinate clerics serving as judges in the Courts of Chancery. The Advocate General was the Crown's advocate, bespoke to argue before these courts of equity, and senior even to the Attorney General: the Crown's chief common lawyer, under duty to argue the Crown's causes before the common-law courts. The Crown set up the Courts of Chancery to offer justice, where the common law offered no remedy:

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[848] *See* STRYKER, *supra* note 48, at 252–52. Stryker argues for division of American common lawyers into two classes: attorneys licensed to research and instruct the barrister; and barristers, lawyers licensed to argue before the court. In support of his argument, Stryker cites Moses in his mission to persuade Pharaoh as an example of the earliest recorded authorization of the distinction between the function of an instructing solicitor and a barrister. *See Exodus* 4:1–17. The LORD recognized in Moses an unwilling speaker and, therefore, chose not to send him on a mission to persuade, substituting his brother Aaron as Moses' mouthpiece. Stryker maintains that if God is unwilling to send an unwilling spokesman on a mission to persuade, we must make the same distinction. *See* STRYKER, *supra* note 48, at 251–70. On the other hand, Moses' mission was also like unto preaching, more a charge to proclaim deliverance, thunder judgment, or both, as well as a mission to persuade. *See, e.g., Jeremiah* 1:19, *Jonah* 1:2. Jonah was an unwilling prophet made willing after experiencing the consequences of refusing to comply with the will of the LORD. "Your people are willing," said David, "in the day of your power." *Psalm* 110:3.

[849] 1 BLACKSTONE, *supra* note 12, at 62.

> [I]n the rough days of the thirteenth century, a plaintiff was often unable to obtain a remedy in the common-law courts, even when they should have had one for him, owing to the strength of the defendant, who would defy the court or intimidate the jury. Either deficiency of remedy or failure to recognize it was a ground for petition to the King in Council to exercise his extraordinary judicial powers. A custom developed of referring certain classes of these petitions to the Chancellor, and this custom was confirmed by an order of Edward II in 1349. The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority, and this practice continued, so that there came to be a Court of Chancery as an institution independent of the King and his Council.[850]

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[850] P.V. BAKER & P. ST. J. LANGAN, SNELL'S PRINCIPLES OF EQUITY 8 (1982). The name *Chancellor* signified the lattice the priests sat behind in the confessional: a fine working of crossed wicker or wire, forming a barrier through which the confessor's voice readily passes, while (in theory) preventing visual identification of the confessor. Rome's priests first called this visual barrier a *chancel*, meaning to "cancel," "strike," or "X" out. The penitent believed the priest had the power to *cancel* his sins once his admission of them passed through the chancel; hence the name Chancellor as the *canceller* of sin. But see *Mark* 2:7, where the lawyers reasoned aright, "Who is able to forgive sins, *except one?: God* [*ει μη εις ο Θεος*]."

Those whose law and government has arisen, directly or indirectly, out of countries such as China, Egypt, and Germany, use *Chancellor* (Latin: *cancellarius*) as an official title signifying chief judge or dictator. In civil-law countries, officers of various degrees of dignity have borne the term. The original chancellors were the *Cancellarii* of Roman tribunals, whose most visible history is in the offices of provincial governors: ushers who sat in front of the *cancelli* or lattice-work screens used in a civil-law tribunal (called a *βασιλικος: basilica*) to separate the imperial judge and counsel from the audience. The verb form (*cancellare*) signified the act of scrawling a written cross (X) over a document of legal significance, meant to annul it. The Latins pronounced the first letter of cancellare with the hard *c*, as the English "cancel."

The arbitrary powers of the office of chancellor continue to arise in modern times. In 1933, Germany's President Hindenburg appointed Adolf Hitler to the chancellorship. On 23 March 1933, after the Reichstag fire, the German Parliament passed the Enabling Act, giving to Hitler power to legislate without the approval or consent of the Parliament: making him dictator. After President Hindenburg's death in 1934, the German Parliament combined the power of the office of Chancellor with that of President, concentrating both offices in one man, creating the all-powerful *Führer und Reichskanzler* (Leader and Imperial Chancellor) of the total German state. As was Nimrod in Babylon and Saul of Israel, Hitler became the product of the majority's voice.

Being a common-law country, the United States federal government has no office titled *chancellor*, except the Chancellor of the Smithsonian Institution, a largely ceremonial office held by the Chief Justice of the United States and akin to a university chancellor—the university also having its origin in civil-law culture. Wile acting in equity, some states call their judges *chancellor*, though unofficially. Delaware, however, still has separate Courts of Chancery with jurisdiction in equity; judges sitting on these courts are called chancellors.

"The basis of equity," says Heward, "is that laws cannot be framed to cover every circumstance that may arise and that judges must have a discretion to do justice in individual cases."[851] Equity concerns itself with the intention of the parties and substance of the matter, not the expression and form only. In the early Courts of Chancery, the Church held power over matters of confidence that begged prompt action and wide discretion in judgment in order to avoid irreparable harm—marriage and annulments, adoption, trusts, wills, and probate—or circumstances requiring a softening of the harsh rules governing arm's length relationships, such as those of contract law and property law.

In time, plaintiffs unable to fit their complaints of wrongs done into any of the available forms of common-law writs (causes of action) began to petition the Courts of Chancery, asking the chancellor to fashion a new remedy (writ) that addressed their peculiar case. This, the Courts of Chancery were eager to do because new remedies expanded their power over unclaimed judicial territory, but without encroaching upon jurisdiction belonging to the common-law courts. Chancery eventually called its jurisdiction *equity* and called its tribunals the *courts of the Crown's conscience*.

Because the Crown appointed early chancery judges from Rome's priesthood, these judges ignored the common law and used the principles of civil law. At first, this meant unpredictable and wide judicial discretion, no recognition of precedent, no due process,[852] and personal jurisdiction (power over a person rather than a thing), and power to punish contempt. Practice and procedure was according to civil-law

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State courts often call equity jurisdiction—trusts, will, estates, receiverships, and family law matters—, *Chancery Division*.

The office of chancellor has spread with Rome's universities and government: reaching England with the Norman Conquest, appearing in Denmark during the twelfth century, and being introduced by Charles XII into Sweden's government in 1713. Sometimes the office is nominal or merely honorary; at other times, it carries the arbitrary powers associated with its name.

[851] HEWARD, *supra* note 386, at 171. Equity is the common law's recognition of the inadequacy of attempts to legislate, i.e., lay down rules to cover all future behavior. The dangers of equity are abuse of discretion and usurpation of common law authority. "Blackstone complained that John Waltham, who was Master of the Roles between 1381 and 1386, by a stained interpretation of the Statute of Winchester, devised a writ of subpoena returnable only in the Court of Chancery as a way of enforcing the equitable right of beneficiaries." *Id.* at *Introduction*, *citing* 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 52 (12th ed. 1794).

[852] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ, providing biblical examples of due-process violations driven by judicial passion).

fundamentals: the judges ignored the right to trial by jury, deposed witnesses in secret, and forbade use of the common law's engine of truth, public cross-examination—except if done by the judges.

Taken together, all these civil-law practices resulted in decrees subject only to the imperious pleasure of judges, haphazard at best. Until about 1800, England's common-law courts recognized the rule of law;[853] while her equity courts recognized each chancellor's unpredictable conscience:

> Equity is a roguish thing. For the [common] law we have a measure, [and] know what to trust to . . . [on the other hand] equity is according to the conscience of him that is Chancellor, and as [his conscience] is larger or narrower, so is equity . . . [T]hey should make the standard for the measure of the Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot; 'tis the same thing in the Chancellor's conscience.[854]

The Crown was glad to have the chancery judges as its *conscience* because these boosted royal prestige at a minimal cost: the priests acting as England's chancery judges were Rome's and she paid them well. The English Crown, therefore, needed not pay them much. The Chancery Bar, however, developed slowly, remaining unorganized until about 1600. Even thereafter, chancery lawyers were few: at any given time, only four or five civil lawyers were licensed to appear before the Courts of Chancery; moreover, these appeared only if a solicitor selected them to represent the solicitor's client.

After the Reformation and until 1857, English Courts of Chancery continued their ecclesiastic jurisdiction over traditional family matters: trusts, divorce, annulment, custody, and probate of wills. Though these equity courts enjoyed wider discretion, they evermore subjected their discretion, rules of law, and procedure to controlling common-law first principles such as *stare decisis*.

The civil-law courts in England—ecclesiastic, chancery, admiralty, and chivalry—called the one licensed to argue before them *advocate*:[855] a

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[853] See generally §§ 4.5–4.5.2 of this book (discussing the use of the phrase *rule of law* in the ancient world, in Scripture, and in modern times).

[854] JOHN SELDEN, TABLE TALK (1689), *quoted in* BLACK'S LAW DICTIONARY 225 (7th ed. 1999). Time and *stare decisis* has narrowed the Chancellor's discretion.

[855] In the usage of the civil-law tribunals, *advocate* is a Latin term from the Latin imperial-church tradition.

civil-law title comparable in rank to the common-law title serjeants-at-law. The civil-law standards carried over from Roman ecclesiastic courts required a doctor's degree before Chancery granted an advocate's license to practice in its courts.[856] After the Reformation in England and England's official separation from Rome, the English Church purchased buildings for use as courthouses for their ecclesiastic courts, which later became the Courts of Chancery. The English, referring to scholasticism's required doctor's degree to practice in these courts, called these courthouses *Doctors' Commons*. The Courts of Chancery continued in these buildings until Parliament passed the Judicature Act of 1873, establishing the Supreme Court of Judicature and directing all divisions of that Court to apply the principles of equity that the Courts of Chancery had applied.[857] In a word, Parliament transferred equity jurisdiction from Chancery to the common-law courts—as have many American States, sixty years later and beyond.

Nowadays in America, most state trial courts and federal district courts have jurisdiction to hear questions of both equity and law;[858] this, however, never abolished the distinction between the two in fact, but rather, clothes the same court with authority to give both common-law remedies and equitable relief.[859] Equity courts and equity jurisdiction, now subject to common-law principles of due process, provide an indispensable facet of justice. Although equity is available where needed, common-law jurisdiction and principles remain the beginning point in any legal dispute. Equity jurisdiction and its special rules apply only where application of common-law principles will work injustice or offer no remedy. In a word, invocation of equity must follow failure of common-law to provide a just (fitting and fair) outcome.

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[856] Charles Dickens served as a court reporter in one of these Doctors' Commons courthouses; based on these experiences he wrote the novel *Bleak House*.

[857] *See* HEWARD, *supra* note 386, at 172.

[858] The Judicial Power Clause of the Constitution grants common-law jurisdiction to the federal courts, which includes both law and equity. *See* U.S. CONST. art. III, § 1, cl. 1; § 2., cl. 1. In the common-law tradition, *law* is an abbreviated form of *common law* as distinguished from equity; at other times, the speaker or writer intends the term "law" to include equity.

[859] Strictly speaking, we have not *merged* law and equity in the United States; rather, it is more accurate to say that the same court has jurisdiction to exercise both. Whereas law (common law) and equity (chancery) at one time were separate jurisdictions exercised by separate courts, nowadays, though the two remain separate jurisdictions they are lodged within and exercisable by the same court. Standards of law and standards of equity prescribe which jurisdiction the court must exercise in any given instance. In order to apply equity jurisdiction in common-law courts, one of the parties must claim principles of equity and press the court for their application.

For example, legislation is unavoidably speculative, separated from life, and insensitive to the finer distinctions of the unique circumstances of individual relationships. Nonetheless, legislation, standing alone, demands conformity regardless of the undue hardships it brings to some but not to others. However, as common-law courts continue to apply any piece of legislation, they will more finely tune its application to individual affairs. Appellate courts will also fashion rules to guide lower courts by distinguishing unprecedented cases and clarifying ambiguities in the legislative language.[860]

Nevertheless, a court of law is bound to go only so far in applying legislation. If, after pondering every option "at [common] law," the court finds no option that will bring a just (fitting and fair) outcome to the parties before the court, upon the request of a party, the court will enter the field of equity to discover a remedy that will work justice. Courts, however, will not enter the field of equity, until the parties exhaust, as inadequate to the demands of justice, all other possible common-law remedies. Thus, the common law holds that consideration of equitable remedies must only follow an exhaustive consideration of remedies at common law, finding them all wanting to the demands of just (fitting and fair) outcome. In a word, unless equity holds exclusive jurisdiction over the subject matter before the court—such as family law or trusts—, *equity follows law*. Moreover, within the field of equity, the common-law fundamentals of method apply, such as due process and stare decisis or precedent. "While it is said that equity affords relief when there is no common law remedy, equity is still very much a creature of case law."[861]

American courts sitting in equity over such matters as divorce, probate, and trusts still echo their ecclesiastic court beginnings. For example, when hearing matters of equity, such as probate or injunctive relief, courts tend to act more on their own motions than when hearing a common-law contract dispute: when before a court considering an issue at common law, if a lawyer wants something for his client, he must tell the judge and press for action. Judges presiding over matters of common law do not issue writs unless asked and persuaded of the need according to law. Moreover, judges sitting at common law are not as responsible to look out for the interests of unrepresented parties, acting more in the capacity of an umpire; it is never their place to give advice or initiate action.

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[860] See generally § 5.1.8 of this book (distinguishing between *legalism* and *law*, using examples of legislative ambiguity).

[861] ROUNDS, *supra* note 363, at 607.

Almost all North American common-law jurisdictions—with the exceptions of Delaware, Arkansas, Tennessee, and Mississippi[862]—have given equity jurisdiction to the common-law courts and ended separate courts of chancery. If a party persuades the court that common law offers no just (fitting and fair) remedy, the court will apply principles of equity.[863] Over the centuries, common-law-like methods and procedures called rules of equity have developed, bringing equity under common law's surefooted guiding principles, thus, making equity reliable. Equity, therefore, is now a part of our common law:

> Chancery's jurisdiction was complementary to that of the courts of common law—it sought to do justice in cases for which there was no adequate remedy at common law. It had originated in the petition, not the [common law] writ of the party who felt aggrieved to the Lord Chancellor as 'keeper of

[862] *See* CHARLES E. ROUNDS JR. AND CHARLES E. ROUNDS III, LORING A TRUSTEE'S HANDBOOK 8 & n.19 (2008). Some states, having abolished separate courts of law and chancery, still distinguish cases of equity matters when filed, such as injunctive relief and estates, by stamping them *Chancery Division*. Thus, when the case comes on for hearing, the court clerk, seeing the stamp, will send it to the judge assigned to hear cases of original jurisdiction in equity.

[863] In most instances, a court using common-law first principles has enough authority to achieve justice. A court sitting in an equity proceeding, however, holds the additional power to compel disobedient parties to act by threat of declaring such parties in contempt of the court. Therefore, the equity courts also acted *in personam* (against persons) in enforcement of their decisions. Equity holds jurisdiction over persons and the power to compel them to do, or bar them from doing, that which equity's judge (the chancellor) commands or forbids. Thus, equity holds authority to soften the harshness of law's letter, while handing the judge (the chancellor) a club (the threat of contempt) to enforce its decrees. Therefore, in keeping with civil-law principles, the judge sitting in equity holds the power of interpretation of the law (the judicial power) and its enforcement (the executive power). Whether such raw power in a judge is desirable fomented conflict in both England and America.

Because equity courts compounded judicial powers of interpretation with executive powers of enforcement, the equity courts were an institution of civil-law principles that violated the common law's separation-of-powers requirement. Thus, for many centuries, England vigorously resisted equity jurisdiction. England's resistance subsided, however, when equity jurisdiction conclusively fell under the control of the common-law courts. Common law is sometimes harsh in its judgments, but enforcement of common law's judgments, unlike equity jurisdiction, depends on someone other than a judge and those he commands.

Because equity acts *in personam* (against the person), the common law calls the powers of equity *extraordinary*: only to be allowed when no other option is available and a high indication of manifest injustice is shown probable by clear and convincing proof. A legal judgment standing alone is not worth much until the court claims its equitable power; thus the old saying, "With a court judgment and a dime you can buy yourself a cup of coffee." Court judgments in private actions are often worthless until equity enforces them.

> the king's conscience.' . . . By 1800, however, Chancery was itself regarded as being both consistent and certain.[864]

Even as early as the beginning of the fourteenth century, however, equity had become somewhat steady and certain because it fell under the safeguards of common law such as *stare decisis*. For example, during the time of Edward I. (1272–1307), Parliament complained that the clerks in "the Chancery were too much attached to ancient precedents" to fashion fresh remedies in the form of writs, where no remedy existed at law for wrongs alleged. Therefore, in order to "quicken the diligence" of the chancery clerks, Parliament enacted the Statute of Westminster 2,[865] which was "only in affirmance of the common law on this subject . . . ."[866]

Despite England's Courts of Chancery having embedded texts of Roman canon law and *Corpus Juris Civilis* in their recorded opinions as dicta,[867] England's early equity courts controlled and dominated equity's growth by conforming it to the analogies of the common law. The maxim of equity came to accord with the first precepts of common law: *e.g.*, where there is a right (law), there is a remedy (equitable relief).[868]

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[864] A.H. MANCHESTER, MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750–1950 135–36 (1980). Once England's Courts of Chancery had submitted themselves to the governing principles of common law, England grew comfortable with the Courts of Chancery. "While it is said that equity affords relief where there is no common-law remedy, equity is still a creature of case law [common-law case precedent]. It is far from a 'code' as that term is understood in France and other non-common-law jurisdictions." ROUNDS, *supra* note 363, at 2–3. The common law's subjugation of equity demonstrates the genius that allows the common law to borrow particulars from civil-law systems and then subject these to the guiding principles of common law without altering these principles. Equity arrived in the American Colonies as an aspect of the common law. "Just as the original thirteen states adopted substantially the entire common law of England, so they took over with little change the English system of equity jurisprudence . . . ." G.G. BOGART AND G.T. BOGART, TRUSTS AND TRUSTEES § 6 (1984), *quoted in id.* The reformers' detest for civil law and its doctrines of equity clung to the Massachusetts courts until they were convinced it carried no real threat to common law. Not until 1877 did "equity w[i]n full recognition as a complimentary part of the judicial system of Massachusetts." Edwin H. Woodruff, Chancery in Massachusetts, L.Q. REV., 370, 383 (Oct. 1889). "[I]n no other state in the Union was there such long and stubborn resistance made to chancery." *Id.* at 384.

[865] *See* 13 Edw. 1, ch. 24.

[866] HERBERT BROOM OF THE INNER TEMPLE: BARRISTER-AT-LAW AND READER OF COMMON LAW IN THE INNS OF COURT, LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED 302 (Philadelphia, T. & J.W. Johnson & Co. 1874).

[867] Common-law *dicta* are judges' personal opinions or illustrations included in an opinion. As a technical matter, dicta are without authority; as a practical matter, dicta elucidate a judge's intention and purpose in finding as he does.

[868] *Ubi jus, ibi remedium*. *Id.* at 191–92, 204. Borrowing wording from *Matthew* 5:17, Maitland states in hindsight that equity came not to destroy the law, but rather to fulfill it. *See* F.W. MAITLAND, LECTURES ON EQUITY 18 (1909).

§ 3.9.7
Early English Courts & Bar

Three distinct common-law courts developed in England: the Court of the King's Bench, the Court of Common Pleas, and the Court of the Exchequer. The King's Bench had jurisdiction over torts, breaches of official duty, crimes against the Crown, and the general peace of Englishmen. The early Norman kings sometimes presided on the King's Bench, if they were so disposed. Their presence, however, was more a matter of form and appearance. For example, after losing the French lands, King John—signer of Magna Carta—often presided at the King's Bench.[869] The King's Bench consisted of a chief justice and several privy or lesser justices, all appointed by the king—somewhat as our President appoints Supreme Court Justices.

At any given time, the number of judges sitting on the King's Bench varied from four to six. The King's Bench held appellate jurisdiction over all three common-law courts, including itself, by way of motions to reconsider and post-trial motions. Thus, Lord Chief Justice of the King's Bench was the highest-ranking justice in England. The Court of Common Pleas held jurisdiction over civil litigation, other than tort actions, between Englishmen. Most often, cases brought before Common Pleas were contract actions and disputes over real property. The Court of Exchequer handled disagreements between the Crown and private parties over taxes. Greater and lesser barons presided over the Court of Exchequer.

The early Germanic tribes had followed the *Volkriht* ideal that kings, being servants of the people, are to make available the means of justice. In their custom, this meant that the king must bring courts to the people's doors, instead of the people coming to find the courts. This custom came to Britain with the Anglo-Saxons and Danes. Since the courts were part of the king's council, the courts moved with the king: the king and common-law courts were ambulatory, ever on the move. During the pre-Norman days in Anglo-Saxon England, the roads were impassable during the wet seasons. It was impossible to ship food into any one of the king's residences year around. Thus, to provide convenient

[869] King John worked hard, but lacking principle, his reputation was bad. For example, John made the following contingent promised to the powerful North-African Sultan of Morocco: if the Sultan will provide England with military support against the French, then John promised to bring England into Islam's submission. Fortunately for England, the Sultan refused, enabling the barons to force John, instead, to parley with them, resulting in his signing of Magna Carta.

supply baseas for the king's ambulatory courts, the king had different residences set at wide distances. The Crown, accompanied by the courts, began, therefore, to change residences as much out of necessity for provender as it did for providing access to the courts.

After the Norman Conquest, handiness for the king became paramount; the reason for the Anglo-Saxon custom of an ambulatory king and courts—to bring justice to every man's door—receded and disappeared. The king changed residences with the seasons according only to availability of supplies for his entourage. Lacking any refrigeration during the summer months and roads being impassable in winter prevented re-supply at a given royal residence. Thus, the king and his many retainers ate up the food supply at any given residence within a month or two (or even less) and then moved to another residence in pursuit of more food and supplies.

The king's unpredictable and never-ending need to relocate from royal residence to royal residence to satisfy his hungry assemblage soon trumped any thought of stopping in every shire and borough to open the courts for business. Hopeful litigants in sore need of justice and longing for their day in court took to the mud roads to track down king and courts. Without means, however, of discovering the king's whereabouts, many grew weary of the chase. Justice became a function of the cost and time spent of finding the king and the courts; justice became economically prohibitive.

Thus, Magna Carta required King John to fix the location of the Court of Common Pleas, never to move it.[870] John signed with his seal attached and then fixed the Court of Common Pleas at Westminster Banquet Hall—the Palace of Westminster, six miles west of London, in what is

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[870] *See* MAGNA CARTA ch. 12: "Common pleas shall not follow our court, but shall be held in some fixed place." Magna Carta fixed the Court of Common Pleas in the permanent location of John's choosing because litigants had wearied of chasing the king as his entourage ambled about the kingdom according to the seasonal and fortuitous availability of provisions.

Richard Chenevix Trench, Britain's learned linguist and Greek lexicographer, once said that there can be more meaning hidden in the history behind the etymology of a word than in the history of a military campaign. The etymology of *suitor* illustrates Trench's comment. Some say "suitor" stems from *sequi*, meaning to follow: so-called because plaintiffs were "following up" on their claims. But "suitor" more likely derives from the necessity forced upon litigants from 1066 'till 1215, of having to chase down the courts, "following after" (*sequi*) them from place to place as the courts remained on constant move with the Crown as it unpredictably changed residences according to availability of provender.

By King John's signing of Magna Carta, he agreed to fix the location of the Court of Common Pleas. Magna Carta, however, never fixed the location of the residence of the Crown; to this day, out of ancient custom, the Crown still changes residences with the seasons.

now the city of Westminster—, where it sat from 1215 until 1882.[871] During this period of 667 years, no one ever dared suggest that it be moved from the spot chosen by King John in fulfillment of Magna Carta[872]—even as little as twenty feet for purposes of remodeling—, for fear that a defendant, seeking dismissal of a plaintiff's action against him, would challenge this court's jurisdiction.

From 1300 to 1338, before fixing the location of the King's Bench and the Court of Chancery at Westminster with the Court of Common Pleas, Edward I. located the King's Bench and the Court of Chancery up at the old Roman town of York, so that these were nearer to him, while he was on farther north, fighting the Scots. Then, in 1350, the Crown located the Court of Chancery under the jurisdiction of the Lord High Chancellor (distinguished from the Lord Chief Justice of the King's Bench) at the south end of Westminster Banquet Hall, farthest from the door, while the King's Bench sat nearer to the door.

The Exchequer Court is the tribunal section of the treasury department. *Exchequer* is a Norman-French word related to the American term *checkered* and probably referred to the checkered cloth that covered the large table of the royal treasury, where the Crown's accounts were calculated. The Court of Exchequer came to listen to cases in the other two courts if the outcome of an action could impair the ability of someone to pay taxes due. These three great common-law courts—King's Bench, Common Pleas, and Exchequer—sat *en banc* (meaning the entire membership of all three courts' judges are present) in the Exchequer chamber on matters of great importance and on matters of disagreement between courts.

In 1875, Parliament, by statute, consolidated the three courts. As American appellate courts, England's higher courts now review and examine findings of the three common-law courts only as to errors of law in pleadings, verdict, and judgment, but not facts. The facts of a case remain under the exclusive authority of the Jury, or if a Bench trial, the trial court judge. In 1882, the three great common-law courts—King's Bench, Common Pleas, and Exchequer—moved from Westminster; though at a new location, these courts remain stationary due to Magna Carta's requirement. Nevertheless, since before the signing of Magna Carta and until today, the monarch's custom continues: Queen Elizabeth ambles from palace to palace according to the seasons.

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[871] Westminster Banquet Hall was built between 1080 and 1090; the three common-law courts sat there from the signing of Magna Carta in 1215 until 1882.

[872] "Common pleas shall not follow our court but shall be held in some fixed place." MAGNA CARTA ch. 17.

Over the centuries, carpenters had torn down and rebuilt the benches and jury boxes of these courts many times to make room for coronation ceremonies and banquets held in Westminster's Banquet Hall. Westminster was a noisy and drafty place; and, as was the Temple court in Jerusalem in Jesus' day, booksellers, food vendors, and compurgators crowded Westminster.[873] All enjoyed access to watch court business.

The Order of the Coif, or Serjeants, not only held a monopoly in the Court of Common Pleas, but also held, in all other courts, *pre-audience*: the privilege to argue all their motions and causes before any other lawyers argued theirs, even on crowded days. While many lawyers waited in line to argue their clients' motions, the courts allowed Serjeants to the front of the line. These Serjeants presented all their clients' motions first, often leaving no time for the junior men to present motions on behalf of their clients.

Sir Francis Bacon, by managing to become the Crown's Counsel, got in front of even the Sergeants. Crown's Counsel enjoyed pre-audience privilege in all courts, coming before Sergeants even when representing private clients because to delay Crown Counsel's private business delayed the Crown's business. Bacon had no commission bearing Queen Elizabeth's signature. Bacon, however, said that his commission was oracular from the Queen. Even if the Queen had refused to grant Bacon's commission, all believed she had because she never denied having granted it. As long as Bacon held the position of Queen's Counsel, he held certain privileges, such as pre-audience. Law forbade Queen's Counsel, however, from accepting criminal cases, which were often lucrative. The Crown's Counsel remained a member of the order of barristers—but a barrister who brought his motions first.

As of 1500, the Order of the Coif had credentialed only thirty-three Serjeants-at-Law; ten of these were judges. In 1775, out of one hundred and thirty-five practicing barristers, the courts had credentialed only fourteen Serjeants-at-Law; all fourteen of these Serjeants served as King's Counsel.

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[873] For hire, compurgators swore to the truth of another witness's testimony, whether truthful or untruthful. Courts called these compurgators ""oath helpers" because they *helped the oath* of another witness by (so it was said) purging a former witness's testimony of perceived falsity. Besides these oath helpers for hire, there were also witnesses for hire at Westminster: men with straw protruding from the tops of their boots signified their willingness to testify to anything for money. Therefore, money enabled a litigant not only to hire false witnesses, but also to hire false swearers to purge doubt from any previous witness's (compurgator's) false testimony. See generally § 4.3.1 of this book (discussing *oath helpers* and Christ's prohibition against forswearing).

From 1830 to 1837, King William IV. appointed fifty men as King's Counsel, but none were Serjeants-at-Law. Then, in 1845, the Court of Common Pleas admitted all members of the English Bar to practice before it, ending a 600-year monopoly of the Serjeants-at-Law in their lucrative practice before the Court of Common Pleas. Then the importance of the Order of the Coif ended, when in 1873, judges were no longer required to be of this Order. Further, Lord Mansfield (1756–1788),[874] Chief Justice of the Court of King's Bench, ruled that instead of an unlimited number of motions, the pre-audience privilege applied to only one motion per session, according to seniority. Over time, the courts, instead of going by seniority of the lawyers, more and more heard motions according to the order they were filed.[875]

In 1694, Queen Mary II. wife of William of Orange, passed away. In respect of her passing and as an act of mourning, English judges set aside their robes of variegated colors and donned black robes. This tradition of mourning has continued in American courts, where judges wear only black robes, but Americans have forgotten the reason. By 1670, powdered horsehair wigs had become the official distinguishing headpiece of the English barrister. When the Order of the Coif or Serjeant wore his horsehair wig, he laid a piece of linen on top of it to distinguish his rank from other ranks of lawyers. Members of the Order of the Coif, though no longer holding special advantage in the courts, still wear linen on their academic caps on special occasions.[876]

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[874] See generally §§ 4.3.4–4.3.5 of this book (discussing Lord Mansfield's innovative use of the common-law Jury, his distinction between the Jury's authority and its power, and the effect of his view upon the modern Jury).

[875] American State courts often unofficially afford pre-audience to clients represented by counsel before clients representing themselves (*pro se*).

[876] The modern Order of the Coif has now receded from its encouragement of excellence in wielding the laws of evidence as barristers. In the United States, academic honor societies have taken the title *Order of the Coif*. First formed at the University of Illinois Law School in 1902, eighty of one-hundred and ninety American Bar Association accredited law schools in the United States now have chapters of this academic honor society. The Order only allows those law schools affiliated with a university to have chapters. It inducts those students into it that make the best grades on law exams and makes honorary members of those receiving high political appointments, such as Supreme Court justices. Thus, its membership rests on academics and politics.

The original Order of the Coif, however, was never about demonstrating one's knowledge about the common law on written exams, but rather, was about knowing the common law, such knowledge only being had in its doing, i.e., trial. The serjeants of the Order of the Coif were courtroom combatants; the common law of evidence was the weapon by which they lived; they wielded it before the court with such familiarity that they even appeared somewhat aloof from the client and his cause.

The academic honor society called Order of the Coif encourages scholarship; the original Order recognized the skill of a barrister gotten over decades of single-minded devotion to the common-law adversarial tradition. The common-law is not a tradition of

§ 3.9.8
Recent English Courts & Bar

In 1970, Parliament's Administration of Justice Act renamed England's Courts of Chancery the *Family Division*. This Court, being of the civil-law form, has no jury box because the civil law uses no Jury. The Queen's Bench has taken over admiralty jurisdiction. Because Magna Carta does not confine the admiralty jurisdiction of the Queen's Bench to a fixed location, as it does the other jurisdictions held by the Queen's Bench, lawyers practicing admiralty law must travel to the county courts.[877] As in the United States, most civil litigation in England nowadays occurs in courts located in her several counties.

Since 1972, the Crown Courts have assumed jurisdiction over all criminal matters, with the House of Lords holding appellate jurisdiction over criminal cases. The House of Lords, however, remains even less likely to review a given criminal case than is our United States Supreme Court—significant, in that the Supreme Court reviews a smaller percentage of appealed cases each decade. When the House of Lords acts as the reviewing court of last resort, it usually sits as a panel of five judges, more or less.[878] While hearing appellate arguments, the justices of the House of Lords never wear judicial robes; but when appearing to deliver their findings, they don formal dress: traditional robes and horsehair wigs.

A Crown's Privy Counsel[879] reviews appeals from the ecclesiastic courts, admiralty courts, and certain appeals from Crown Colony and

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academics but of the search for truth in tangible fact, regardless of any explanation, or lack thereof. In fact, it stands in defiance of the Greek ideal of wisdom (*σωφια: sophia*), which praises above all else the human mind in showing its academic ability in the abstracted academic setting, and rather encourages true wisdom, which goes further, demanding deftness in discernment and in doing.

[877] *See* 33 AM. J. LEGAL EDUC. 241 (1989).

[878] America keeps a cleaner separation between the powers of government than does England. For example, unlike the House of Lords, which exercise appellate jurisdiction over the courts, the United States Senate takes up a judicial function in only two instances: when trying impeachments of magistrates and officers of the United States of the other two co-equal branches or when sitting in judgment of one of their own members for removal. *See* U.S. CONST. art. II, § 4. Moreover, in cases of impeachment, the Senate's judgment shall extend no further than removal from office and disqualification from holding any office. *See id.* art. I, § 3. See generally § 3.11.4 of this book (arguing that the United States' observance of common-law separation of powers is stronger than England's).

[879] The Queen's Privy Council, also known as the *Judicial Committee of the Privy Council*, comprises Cabinet members and is principal counsel to the Crown. In 1833, it became an official judicial body. The Privy Council is an executive court, exercising the

former Crown Colony or Commonwealth courts. Though these appeals are formally to the Queen, she refers them to the Privy Council in fact for their advice, which she follows because—as Fortescue and Coke observed—it is not common-law custom for monarchs to sit in judgment. Further, Coke saw the reason for the custom: monarchs, not having focused their lives on the discipline of the common law, are unfit to sit in judgment.[880] The Privy Council does not bar the public from its proceedings, but rarely does anyone care enough to attend.

In England, non-barrister lawyers prepare cases for trial, draft instruments, and appear in inferior courts. Before 1873, common lawyers called Serjeants-at-Law practiced in the common-law courts; but advocates, called *proctors*, practiced in the ecclesiastic courts. Then, in 1873, all categories of attorneys in Britain that were not barristers became members of one association calling themselves *solicitors*.

Nowadays, almost every English lawyer has attended three years of law school, alike in every respect to American law schools with only two areas of noticeable difference: constitutional law and tax law, but even these bear much likeness in principle because of their common roots in the common-law tradition. Subjects such as contracts and torts differ at times in minor rules of major principles, but the major principles remain alike with American common law. In England, as in some North

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judicial function with civil-law procedural forms; but as all civil-law courts in common-law countries, the Privy Council observes *stare decisis*.

[880] Magna Carta requires that judges, first, know the *law of the land* (due process) and, second, mean to observe it well. *See* MAGNA CARTA ch. 45. In order to avoid misdiagnosis, it is never enough that a lawyer (or judge) knows *about* the law; he must *know* the law. *See* ROUNDS, *supra* note 363, at 705. In drafting chapter 45 of Magna Carta, Steven Langton used the term *sciant* (translated "know"); in ensuing centuries, common lawyers have understood the sense of Langton's term to be akin to that of the King James Bible translators' rendering of the Hebrew ידע (*yada*: "know") in *Genesis* 4:1: an intimate familiarity, transcending mere acquaintance. See also *Amos* 3:1–2, where the LORD says, "Sons of Israel . . . [o]nly you have I *known* [*yada*] of all the families of the earth." As does the foregoing examples from Scripture, the sense of "know" in chapter 45 of Magna Carta, reaches personal knowledge and understanding that can result only from long and intimate dealings.

The writer once worked for a lawyer, who, upon graduating from law school, had clerked for a federal district judge that neither had attended law school nor had ever held a license to practice law. Appointed by President Truman, this judge was a willing learner, read the law constantly, and depended on his clerks to inform him of their research. The Constitution does not require an ABA accredited law school education to sit as a federal judge. The common-law tradition, however, does set forth two requirements for judges. *See* MAGNA CARTA ch. 45.

Formal law-school education will never guarantee to the student either of these attributes. Moreover, that one's knowledge carries with it intent to observe the law does not necessarily follow from one's knowledge of the law. The common-law tradition, therefore, provides for impeachment of judges. It is not a person's possession of the knowledge of truth that makes the difference, but rather, the truth's possession of that person.

American States, the Bar association decides matters of attorney discipline and disbarment, with such decisions being subject to appeal.[881]

Solicitors are now eligible, after five years of practice, to become barristers; but the law forbids one to be both a barrister and a solicitor at the same time.[882] In any event, candidates for the basic Bar exam must hold a law degree and nine-months experience working with lawyers and in the courts.[883] The distinction between English solicitors and barristers evermore blurs. Though solicitors still do legal research and draft pleadings, the Court and Legal Services Act now also allows them to appear before any court in England: from the highest courts to county courts. Moreover, solicitors are now eligible for judgeships.

Distinctions between other classes of lawyers are also blurring: even recent Lord Chancellors have been Scottish civil lawyers, i.e., Scottish Advocates.[884] Although the English Bar has consolidated—any member licensed to practice before any of the various courts are now eligible to practice before them all—, attorneys still specialize by concentrating their practice in particular areas, as they do in the United States. In England, law limits the fee an attorney can demand. This restriction, however, does not bind the client; he is free to pay his lawyer without limit.

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[881] *See* 56 A.B.A.J. 237 (1970).

[882] *See* 21 JOUR. MO. B. 218 (1965). The required five-year prerequisite as a solicitor before becoming a barrister reflects the five-year apprenticeship tradition once required to become a lawyer in England. The barrister candidate, however, can mitigate this requirement in proportion to prior education.

[883] *See* 28 J. LEGAL EDUC. 137 (1976); 43 A.B.A.J. 501.

[884] That a Scottish civil lawyer serves as Lord Chancellor is significant in the history of English government. In official precedence, he outranks the Prime Minister and is *de facto* speaker of the House of Lords. Furthermore, he is head of the judiciary of the entire United Kingdom, President the Chancery Division of the High Court, and is a member of the Queen's Cabinet or Privy Council, holding appellate jurisdiction both over Admiralty matters and appeals from British Commonwealth Countries. The Lord Chancellor also exercises many ecclesiastic functions. *See* CHARLES E. ROUNDS JR. AND CHARLES E. ROUNDS III, LORING A TRUSTEE'S HANDBOOK 3 (2008). *See also generally id.* at 3–8 (providing a complete list of all 226 Lord High Chancellors, from Herfast (appointed 1068) to Jack Straw (appointed 2007). The Rounds', however, drop a footnote: "Some give the first chancellor of England as Angmendus, in 605." *Id.* at 3 n.12.

§ 3.10
Common Law in the American Colonies

Spain, France, and England claimed various sections of . . . [the North American] continent . . . [C]onflicting claims led to a great struggle between England and France for supremacy . . . it was a conflict between two races, two languages, two religions, two systems of laws, two distinct civilizations . . . great ideas were behind the struggle.[885]

Acceptance of Scripture's authority saturated the English Colonies in America. In addition, the common-law being consonant with Scripture,[886] the Colonists held a natural affinity for common-law principles of law and government. For example, Scripture taught features of government alike in kind to the common law's Witan: a plurality of elders as an assembly of men (eldership or presbytery) to which an executive or administrative officer must answer and the Jury of independent judges. Moreover, both Scripture and the common-law demanded holding fast to law as an eternal ideal, as opposed to any whimsical, fleeting decrees of mere men. Consequently, American courts have held, as does Scripture, that the rules of law and the measured applications of those rules are discoverable: courts never make law, but instead, find law's applications.[887]

Both traditions held that governments administered by men are limited, since only God is sovereign in the true sense of unlimited jurisdiction: i.e., they believed that opportunities for appeal must exist not only within government, but also, as a matter of individual conscience and practice, beyond the state. Each individual must be free and responsible to appeal direct to his Creator for justification of his intentions and actions; furthermore, such appeal demands freedom of worship.[888] In addition, both traditions kept separate the three

[885] CHARLES CARLETON COFFIN, SWEET LAND OF LIBERTY 6 (photo. reprint 1992) (1881). In September 1759, on the Plains of Abraham, near present-day Quebec Heights, France and Britain decided the struggle over North America by battle; Britain won. Though the British settlements in America accepted the Bible's authority, contrary forces of law and government on the North American Continent made constant challenge, and still do.

[886] See generally § 4.10 of this book (listing 29 principles of accord between the Word of God written and the common-law tradition).

[887] Though the sophist delights, with cynical glee, to make light of the common-law ideal that courts are never to manufacture law, but instead are to make findings of law and its applications, the ideal remains. Further, God duty binds men to uphold this standard and strive toward its excellence. While the sophist stays chained on his circular treadmill of cynic responses, the eternal standards remain steadfast and unchanged.

[888] America justifies its founding upon the appeal of our forefathers beyond the state and governments of men, direct to the personal Creator and Judge of all in heaven and earth: "We, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL

fundamental powers of government—legislative, enforcement, and interpretation of law—and allowed spreading of authority and power throughout the non-government sector by protecting freedom of association.

American colonial sensitivity to common-law dignities reached a degree that some in England failed to appreciate. During the years leading up to the American War of Independence Blackstone's *Commentaries* on the common law appeared; even though the population of England exceeded that of her American Colonies by nearly three times, more copies of the *Commentaries* sold in England's American Colonies than in England. The Colonials' demand for the *Commentaries* was significant, occurring in spite of the *Commentaries'* denial that the common law of England applied in her American Colonies.[889]

Just after the American War of Independence, the population of the American Colonies was about 3,000,000,[890] while the population of England was about 8,000,000. Of the 3,000,000 Colonials, about a third were English Anglicans, Puritans, and Congregationalists; another third were Scots-Irish Presbyterians; and another third were German and Dutch of Lutheran and Reformed churches. One and a half percent of the colonial population were Roman Church devotees; about two tenths of a percent were Jewish. Traces of Protestant groups other than those cited above made up the remaining population.[891] Early American affinity for the common-law tradition was greater even than that of England; American law and government still reflect this greater affinity.[892]

England's eighteenth-century North American colonials reached a zenith of understanding of the common law's accord with Scripture. The

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CONGRESS, Assembled, *appealing* to the Supreme Judge of the World for the Rectitude of our Intentions . . . with firm Reliance on the Protection of divine Providence . . . ." THE DECLARATION OF INDEPENDENCE para. 32 (1776) (emphasis added, capital and lower-case letters in original). Judging from these words, this solemn appeal and reliance—as are all acts of true faith in reliance upon divine Providence, as opposed to reliance upon self-justifying morality—is personal.

[889] See generally § 3.10.4 of this book (discussing the effect of Blackstone's *Commentaries* on Anglo-American common law).

[890] Justice Story, citing to the first United States census, writes, "In 1790 the whole population of the United States was about three millions nine hundred and twenty nine thousand." STORY, *supra* note 89, at 242 (plural *millions* in original).

[891] Though the writer includes Baptists with the Protestants, he hastens to add that some Baptist groups protest, stating that their forbearers predate the Protestants.

[892] American law and government are more English than England's. See generally § 3.11.4 of this book (discussing England's departure from some common-law principles of government, following Parliament's victory over the royalists during the seventeenth century).

engine driving the American War of Independence was, at bottom, the colonial understanding of common-law precepts as the applied biblical view of relationships and government. The American colonial, by informing his interest in the common law with William Blackstone's *Commentaries on the Laws of England*, upheld that interest. Continuing for many decades following American independence, American lawyers appealed to Blackstone more often than any other authority. Blackstone's *Commentaries* remain the best source available for development of the common law at the middle of the eighteenth century,[893] the basis for understanding the United States Constitution.[894]

To gain a feel for the depth and breadth of the mindset that motivated the American Colonists during the late eighteenth century, one need only read popular pamphlets of that day. The common-law precepts were seen as extensions of Scripture and contrary to civil law's imperial doctrines. For example, Thomas Paine, knowing that appeal to Scripture was the most powerful means of persuasion to the American Colonials, took the gist of his argument for his popular pamphlet *Common Sense* from Scripture, arguing that submission to an earthly king such as George III. was without biblical warrant.[895] Using Old Testament examples, Paine argued against imperial notions. "[M]onarchy in every instance," says Paine, "is the Popery of government."[896]

Nowadays we hear that political theorists moved the American Colonies to independence, without appeal to Scripture. Nonetheless, the political theorists that receive such credit, such as John Locke, were devoted students of Scripture.[897] Those that took up the struggle against the mother country testified that not only did the Bible occupy the

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[893] *See* 48 A.B.A.J. 254 (1962). William Blackstone viewed the common law as that tradition of law, other than legislation. "Blackstone divides the . . . law of England into *lex scripta* or statute law, and *lex non scripta* or customs, which are common law strictly so called . . . [and] particular customs prevailing in certain districts." 6 ENCYCLOPAEDIA BRITANNICA, *supra* note 379, at 777, *citing* 1 BLACKSTONE, *supra* note 12, at 63. Blackstone viewed these customs as common law, awaiting written articulation by the courts of record, in response to real cases.

[894] Our freedoms are not in our founding documents, these being, rather, evidence and reminders of our mind and sentiment. Our freedoms are in two things: our holding fast to the common-law traditions we have received and our constant testing of these practices against Scripture and the senses to see if these things are so. *See Acts* 17:11. Confidence only comes by following after and doing the truth, not from mere possession of some papers upon which another has written down these principles.

[895] *See generally* THOMAS PAINE, COMMON SENSE (reprint 1986) (1776).

[896] *Id.* at 76.

[897] *See, e.g.*, JOHN LOCKE, A COMMON PLACE BOOK TO THE HOLY BIBLE 16 (New York, American Tract Society 1856) (emphasis added). *See further* KIM IAN PARKER, THE BIBLICAL POLITICS OF JOHN LOCKE (2004).

thinking of political theorists of that day, but was also the preoccupation of the Colonials' thinking—most having never read any political theory.

For example, in 1842, a young judge set about to find the driving force behind the ill-fitted, under-fed, and under-trained American militiamen to risk the odds and their lives against the well-equipped, well-fed, and well-trained British regulars. Thus, he sought out and questioned ninety-one–year-old Captain Preston, veteran of the historic Battle at Concord:

> "Did you take up arms against intolerable oppressions?" he asked.
> "Oppressions?" replied the old soldier, "I didn't feel them."
> "What? Were you not oppressed by the Stamp Act?"
> "I never saw one of those stamps; I certainly never paid a penny for one."
> "Well, what about the tea tax?"
> "I never drank a drop of the stuff; the boys threw it all overboard."
> "Then I suppose you had been reading Harrington, Sidney, and Locke about the eternal principles of liberty."
> "Never heard of 'em. We read only the Bible, the Catechism, Watt's *Psalms and Hymns*, and the *Almanac*."
> "What then was the matter, and what did you mean going to the fight?"
> "Young man, what we meant in going for the redcoats was this: we had always governed ourselves, and we always meant to; they didn't mean that we should."[898]

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[898] *Quoted in* SAMUEL ELIOT MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 112–13 (1965). It is hard for us to imagine the utter shock of the British at their defeat. They were beside themselves. General Cornwallis, forced to surrender at Yorktown, confused and embarrassed, refused to show himself while his men laid down their arms and ordered his regimental band to play the then familiar pop tune, *The World Turned Upside Down*. Though only the instruments played, the lyrics no doubt danced in the heads all present as the band played:

> If buttercups chased after the bee,
> If ships were on land and churches at sea,
> If mommas sold their babies to gypsies for half a crown,
> The whole would then be turned upside down.

"The arm of British power in America," says Sergeant Joseph Plumb Martin, "was dislocated by the capture of lord Cornwallis and his myrmidons." JOSEPH PLUMB MARTIN, A NARRATIVE OF A REVOLUTIONARY SOLDIER: SOME OF THE ADVENTURES, DANGERS AND SUFFERINGS OF JOSEPH PLUMB MARTIN 214 (New York, Signet Classic 2001) (1830). Of significance is Martin's eyewitness testimony of the British surrender at Yorktown:

> [W]e were ordered to put ourselves in as good order as our circumstances would admit . . . to see the British army march out and stack their arms . . . The British did not make so good an appearance as the German forces . . . the English felt their honour wounded . . . the British paid the Americans, seemingly, little attention as they passed

Convictions going to the ultimate questions of human freedom and government, as addressed by God's Word, stirred the American patriots to risk their property and lives. Political theorists and pamphleteers motivated the American Colonials only as they pointed to the Word of God written for justification of common-law principles. Even Thomas Paine—indeed, no friend of Scripture—influenced the Colonists only as he justified his arguments by appealing to the Bible.

The Word of God is living; as a seed, it imparts its life power to those willing to receive it; as a lethal weapon, it protects those that it enlivens to wield it. Without the Word of God, men are dead, helpless, and hopeless; with it, men are alive, armed, and encouraged. The Word of God enlivened, armed, and encouraged the American Colonials.

§ 3.10.1
Salem Witchcraft Trials: Common Law Ignored

Samuel Sewall, sensible of the reiterated strokes of God upon himself and his family, and being sensible that as to the guilt contracted upon the opening of the late Commission of Oyer and Terminer at Salem, he is, upon many accounts, more concerned than any that he knows of, desires to take the blame and shame of it, asking pardon of men, and especially desiring prayers that God, who has unlimited authority, would pardon that sin and all his other sins, personal and relative. And according to His infinite benignity and sovereignty, not visit the sin of him or of any other upon himself or any of his, nor upon the land, but that He would powerfully defend him against all temptations to sin for the future, and vouchsafe him the efficacious, saving conduct of His Word and Spirit.[899]

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them, but eyed the French with considerable malice depicted in their countenances.

Id. at 206–07. Martin's reference to *myrmidons* (Greek singular, *μυρμιδονες*) gives a further glimpse into the conviction of the young rank and file American continental soldier and why he was fighting. *Myrmidon* is the tribal name of the Thessalian Greek warriors, who fought under their king Achilles in the Trojan War. The tribal name early came to signify those subordinates in civil-law states that execute orders without thought or question, protest or pity—used in modern times of robots and hired killers, i.e., any that kill on command.

[899] THE COLONIAL IMAGE 190 (John C. Miller ed., 1962). Samuel Sewall, Salem magistrate during the witchcraft trials there, gripped by conviction one evening while leading his family in devotions, wrote and posted for public reading this, his confession and petition.

The Salem, Massachusetts witchcraft trials of 1692 were infringements into the New World of civil-law doctrines then raging amuck in the Old World. In the name of expediency, for about nine months, Salem magistrates suspended common-law protections of due process. Indeed, witchcraft *trials* is a misnomer; the prosecution of supposed witches in Salem occurred as the civil law reached its tentacle of *inquisition* into New England through the weaknesses of girlish curiosity and girlish longings for attention, pranks, fear, and attempts to divert blame from themselves. On the false testimonies and play-acting of a group of young girls that had learned of witches and witchcraft from Tituba, a Barbadian slave woman recently arrived in the Colony, nineteen men and women were hanged. The Salem witchcraft tribunals ignored at least three common-law rights: the presumption of innocence, objective evidence, and opportunity to cross-examine one's accusers.

Throughout European history, the use of the images, icons, and incantations has encouraged devil worship.[900] The Germanic tribes used the term *witchcraft*[901] to signify such practices. Fear of witchcraft, as practiced among women, is among the reasons Rome has used to justify forbidding her priests to marry.[902] Rome's control of her priesthood has

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[900] For a nation to arrogate to its religious and political leaders a semi-deified status is to sanction idolatry, which gives opportunity to the political trickery that attends idolatry. *See, e.g., Psalm* 96:5. Examples abound from ancient Egypt to the magical Madonnas of Europe and Latin America. See, *e.g., Genesis* 41:8, *Exodus* 7:11, which both have חרטם (*caretome*): the Hebrew term for *magician* or any variety of occultists. Unlike most Semitic words, which are trilateral, *caretome* has four characters and, therefore, is probably a loan word from the Egyptians. It denotes a variety of occultists and appears in the Aramaic section of *Daniel* signifying the Babylonian magicians. Daniel, by placing *caretome* in parallel literary structure to sorcerers and soothsayers, equates the three.

See Daniel 2:2, 2:27. According to magician Andre Cole, at least 95% of all claimed supernatural phenomena are mere tricks, i.e., natural, not supernatural.

[901] The etymology of *witch* provides a glimpse of the early Anglo-Saxon conception of the term. "Witch" stems from the old Germanic root *weik*, signifying idolatry; its verb form, *wikken* means, "to practice idolatry." The term *witchcraft* denoted, therefore, the practice (craft) of idolatry (witch), i.e., idol worship: claimed attribution of the Creator's authority and power to icons, pictures, or images of created things, or to the creatures themselves, which the worshipper invokes by incantations. The incantations of a witch (if a female) and a warlock (if a male) are their craft. In the apostle's words, idolatry (Anglo-Saxon: "witchcraft") is "worshipping and serving the creature [created thing] instead of the Creator . . . ." Witchcraft is the practice of idolatry (*witch*) by a certain method: i.e., as a *craft*. At bottom, priestcraft and witchcraft are indistinguishable.

[902] Having denied her priests cohabitation with a wife, the Roman Church tolerated, and then encouraged, her priests to cohabit with concubines. Concubinage enabled all the advantages of female companionship, while denying the concubine full legal status of marriage and the enforcement of property rights it brings. Forbidding marriage, however, conflicts with the rebuke of 1 *Timothy* 4:3; violation of this principle has produced—and continues to produce—results of which it is a shame to speak.

always been indispensable to her power. The Roman Church feared that once a priest married, his closeness with his wife would give her a deeper understanding of the powers of priestcraft—such as the conduct of the mass and the secrets of the confessional—, allowing her to use the influence she enjoyed toward her husband to manipulate his use of these powers to her own cravings.[903]

Regarding Rome's fear of witchcraft, Rome did not consider women inferior to men but, on the contrary, Rome held a fear—albeit superstitious, still nonetheless real—of a woman's power over men, including the priesthood.[904] These fears explain, in part, Rome's cruel inquisitional reaction during the seventeenth century, accusing and prosecuting hundreds of thousands for practicing witchcraft, of both women and men.[905]

During those days on the European continent, inquisitors did untold atrocities in inquisition of those accused of witchcraft and, to a lesser degree, in England. The inquisitions against witches and warlocks on the

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The official findings of the English Crown's commission, pursuant to their investigation into the widespread debaucheries of monasteries and nunneries during the reign of Henry VIII., are a shame to mention. *See generally* J.C. RYLE, FIVE ENGLISH REFORMERS (1991) (discussing the folly of forbidding others to marry). Ryle cites the results of this investigation as proof of the shameful results of forbidding to marry. Responding to these results, England closed Rome's monasteries and convents.

[903] The influence of Rome's misogynistic policies has persisted; a page of history is worth volumes of logic. History is not a record of humanity's reasonable or even logical behavior, but foremost a record of humanity's unreasonable and illogical behavior. Pagan culture has proven to ignore proper order and good manners among and between men and women, inducing fear and antagonism between male and female, creating and inflaming unnecessary factions and conflict, and then to driving these factions to bizarre extremes. On the other hand, Scripture orders relationships between men and women aright in proper biblical balance. It is the policy of the common law to encourage such relationships by protecting their sanctity and integrity.

[904] Rudyard Kipling, argued that the female of the species is more deadly than the male, even where her power is misguided. *See* Rudyard Kipling, *The Female of the Species*, *in* GUNGA DIN AND OTHER FAVORITE POEMS 66 (Stanley Applebaum ed., 1990): "When hunter meets with husband, each confirms the other's tale: the female of the species is more deadly than the male." Upon first publication in *Ladies Home Journal* in 1915, Kipling's *Female of the Species* was an instant success among women. In recent decades, however, some have labeled Kipling's poem misogynistic. The poem reveals, through vivid comparison and contrast, the weakness of men, while praising the natural feminine attributes as indispensable to the race of man.

[905] Traditional English translations of the Scriptures have referred to male practitioners of witchcraft (literally, "practitioners of idolatry") as "wizards": Hebrew, ידעני (*yidanee*), from the root ידע (*yadah*), signifying unnatural and forbidden familiarity with a particular created thing. *Yidanee* also denotes unnatural familiarity with spirits of deceased ancestors. For example, in *Deuteronomy* 18:11, the Hebrew אוב (*'aov*) is likely related to the root אאב (*'av*), meaning *father*, in the sense of a deceased ancestor. *See also Isaiah* 19:3. See generally § 3.10.1 of this book (discussing the witchcraft trials of the seventeenth century in Europe, England, and America).

continent, and even the witchcraft trials in England, were far and away more vicious and undiscerning than were the Salem witchcraft trials: a touching of the New World by the mania then raging in Europe under the direction of Rome's inquisitors, following the methods of Rome's *Malleus Maleficarum*.[906]

Malleus Maleficarum—English, "The Hammer of Witches"—is a manual of civil-canon-law inquisitional methods and devices of obtaining evidence and prosecuting, whereby over one hundred thousand persons suspected of witchcraft were tortured and put to death on the continent. In May of 1487, the Roman Church had first submitted the Latin text of *Malleus* to the University of Cologne. *Malleus* based its methods of inquisition upon the doctrine of the civil law that subsumed a nation's identity in its emperor. Thus, the civil law deemed crimes to be personal offences against the emperor. The civil law being in force on the continent, prosecution for the crime of witchcraft was, therefore, conducted in true inquisitional spirit: to avenge the suspect's sin against the emperor. Using the devices described in *Malleus,* the Roman Church tribunals tortured and murdered both sexes in numbers unknown, though more women than men.

On 5 December 1484, the inquisition moved into full swing; pope Innocent VIII printed in the front of the *Malleus*, his papal bull of approval, directing its force to "some parts of upper Germany." Later, "[w]hen the wicked and cruel Alexander VI. was in the papal chair, he set the inquisitors to work . . . ."[907] In the Swiss canton of Vaud alone, over three thousand accused of witchcraft were burned:

> They burnt six hundred poor old women in the bishopric of Bamberg Germany. By the shore of lake Geneva, in 1515, during three months more than five hundred were burnt to death . . . .
>
> All through Spain, France, Germany, and Holland, during these years, thousands of men and women were burnt. In the village of Lindheim, in Germany, containing only six hundred inhabitants, thirty were put to death in one year. More than one hundred thousand were burnt . . . .[908]

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[906] *See* JAMES SPRENGER AND HENRY KRAMER, MALLEUS MALEFICARUM (Montague Summers trans., 1928) (1486).

[907] CHARLES CARLETON COFFIN, SWEET LAND OF LIBERTY 303 (photo. reprint 1992) (1881).

[908] *Id.* at 303–04.

In the southwest of Germany, between the years 1561 and 1670, the *powers that be* accused at least 3229 men and women of witchcraft and executed them. Before reaching the American Colonies, Rome's continental witch-hunt spilled over into England:

> In 1618 seventeen witches were condemned to death in Lancashire; sixteen in Yarmouth; fifteen at Chelmsford. Matthew Hopkins was appointed witch-finder . . . In a short time over one hundred persons [men and women] were hung . . . .[909]

Salem's reaction, though inexcusable, was, by comparison, an aberration.

The European continental inquisitors knew nothing of the common-law rules of evidence; the English courts knew these rules relaxed them, admitting arbitrary evidence of un-established reliability such as the presence of warts, pimples, wens, and cysts: said to be evidence of demonic activity. No common-law authority says that such blemishes are evidence of witchcraft. In England, Chief Justice Sir Matthew Hale, presiding over many trials for witchcraft, tried to hold the court's consideration only to evidence admissible under the common-law rules. Justice Hale called the learned physician Sir Thomas Brown to give opinion testimony of the fits of the accused: "[T]he fits were natural," said Brown, "but heightened by the devil cooperating with the malice of the witches at whose instance he did the villainies."[910] Those accused often verified the stories of the accusers by confessing their league with the devil.

Soon, every ship from England arriving in Massachusetts brought fresh stories of witchcraft and accounts of hundreds, even thousands, of witches in the Old World being burned and hanged. Into this fragile enclave carved from the New World's wilderness, the slave Tituba arrived from Barbados. During the long winter evenings, the young girls of Salem gathered in the kitchen of Tituba's owner Samuel Parris and listened to her mysterious accounts of Barbados. Tituba showed them how her people used sorcery to call up the devil and his imps. Tituba then introduced Abigail Williams (age 11), Anne Putnam (age 12), Mary Walcot (age 17), Mary Lewis (age 17), Elizabeth Hubbard (age 18), Elizabeth Booth (age 18), Susannah Sheldon (age 18), and Mary Warden

[909] *Id.* at 304–05.
[910] *Id.* at 305.

and Sarah Churchill (two servant-girls) to incantations and taught them how people in Barbados imitate animals while under spells of witchcraft. The girls practiced these imitations, taking delight in creeping about like cats, dogs, and hogs: mewing, barking, and grunting, screeching, and pretending spasms.

The girls, relishing the attention their antics drew, carried milder larks into church services: one girl, for example, interrupting a sermon by claiming aloud that she saw a small colorful bird perched upon the preacher's head. Though seeming mild and innocent, the girls were toying with danger; when questioned about their behavior, in order to divert blame, the girls thought it clever to accuse women and later men, young and old, of tormenting them with witchcraft. Thus, the Salem Massachusetts witchcraft trials arose out of confusion began by these girls' playful antics, excuses, and then hysterics—begun in girlish curiosity gone awry in fun, but ending in death and remorse.

Called before the magistrates privately, the girls, by that time hysterical, accused Sarah Osburn, Sarah Good, Martha Cory, Rebecca Nurse, and Sarah Good's daughter Dorcas of tormenting them through witchcraft. They later accused Sarah Cloyse and Elizabeth Proctor in open court: "I saw a company of witches," testified Abigail Williams, "at the Reverend Mr. Parris's house, there were forty of them . . . Sarah Cloyse and Sarah Good were their deacons, and the witches drank blood."[911] At hearing this, Sarah Cloys fainted to the floor, the accusing girls went into convulsions, and Mr. Parris's slave rolled on the floor, all claiming that witches were tormenting them.[912]

The Barbadian Tituba, when asked if the girl's accusations that she pinches them were true, answered "yes," thereby giving credence to the girls' testimonies. Tituba further testified that the devil had come to her at night, appearing as a hog, a black dog, a red cat, and a black cat, biding her to serve him. Tituba then said that Sarah Osburn and Sarah Good asked her to torment the other girls, and that she had gone to meet the devil riding on a stick with Sarah Osburn and Sarah Good riding behind her, sometimes going up over the trees and on to Boston.

Cotton Mather recorded his perceptions of witchcraft in the Massachusetts Bay Colony;[913] the written testimony of John Winthrop provides additional credible evidence concerning the Ann Hutchinson

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[911] *Id.* at 314.

[912] *See id.*

[913] *See* 2 COTTON MATHER, MAGNALIA AMERICANA; OR THE ECCLESIASTICAL HISTORY OF NEW ENGLAND (HARTFORD, SILAS ANDRUS 1820), *quoted in* PETER MARSHALL AND DAVID MANUEL, THE LIGHT AND THE GLORY 238 (1977).

affair that will move any unbiased investigator to serious consideration. Winthrop served as the first governor of the Massachusetts Bay Colony; his reputation for honesty is impeccable; his credibility as a witness is incontrovertible.[914] Nevertheless, common-law due process must never give way to the doctrines of Babylon: inquisition and vengeance.

In later years, one of the hysterical girls, Anne Putnam, having matured to womanhood, stood before the congregation in Salem Village and humbly apologized for being an instrument of accusations of grievous crimes against several persons, whereby their lives were taken away. On 14 January 1697, Samuel Sewall, one of the magistrates at the Salem witch trials, likewise responded to his part in the trials with Christian repentance, posting for public view, in one document, his confession to God and petition to men for pardon.

During the Salem witchcraft trials, the ministers of Massachusetts counseled caution and restraint to the courts; finally, pressure from the Puritan clergy ended the witch trials. It were better, Cotton Mather had counseled the civil authorities, that ten suspected witches should escape than that one innocent person should be condemned. By insisting upon the presumption of innocence, objective evidence, and opportunity to cross-examine one's accusers, our courts will best protect the innocent during times of hysteria.

§ 3.10.2
The Colonial Common Lawyer

When the Constitution was drafted, American society was infused with common law ideas . . . The revolutionary experiment heightened Americans' adherence to common law, especially to the idea that the principles embodied in the common law controlled the government.[915]

Because common lawyers have done much to shape the common-law tradition, in order to understand Anglo-American common law, a tolerable understanding of English common lawyers is needful.[916] The leaders of the colonial American Bar were English barristers taught in the English Inns of Court.[917] After 1760, the influence of colonial American

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[914] *See* 1 JOHN WINTHROP, HISTORY OF NEW ENGLAND FROM 1630 to 1649, 313–16 (James Savage ed., Boston, Little, Brown and Co. 1853) (1650).

[915] RICHARD F. HAMM, *Common-Law Court, in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1992, at 171 (Oxford, 1992).

[916] See generally §§ 3.9–3.9.7 of this book (discussing the study of the English common law in the Inns of Court and the development of the common lawyer).

[917] *See* 17 A.B.A.J. 740.

lawyers grew as they objected to the mother country's assertion of admiralty jurisdiction and regulation at the cost of common-law freedoms. During the sixteen years before American independence, more American students than English students learned common law in England's Inns of Court; Americans still feel the influence of these students:

> Between 1760 and the Revolution, a hundred and fifteen American students were educated at the Inns of Court. Five signers of the Declaration of Independence, five delegates to the Continental Congress which adopted the Articles of Confederation, and six of the signatories of the United States Constitution were graduates of the Middle Temple.[918]

Though not all graduates of England's Inns of Court, twenty-five common lawyers signed the Declaration of Independence and thirty-one of the fifty-five signers of our Constitution were common lawyers. [919]

The American Colonies of about 3,000,000 people were training and bringing home from the Inns of Court common lawyers in a greater proportion to their population than the mother country of about 8,000,000 people. Through these men, the common law exerted a significant force upon the birth of our nation. John Rutledge, among the Justices appointed to the first United States Supreme Court in 1789, learned the common law in the English Inns of Court.[920]

During the English Civil War, the English Puritans had objected to the Crown's claiming all lawyers to be the Crown's agents; the Massachusetts Bay Colony was sympathetic with its Puritan brethren in the mother country on this point. That lawyers are not agents of the state prevailed in the American Colonies throughout their War for Independence, throughout the United States until modern times, and remains an indispensable first principle of the common law.[921]

Settled first by the Dutch, the Colony of New York had grown accustom to the civil-law tradition. After the British captured New York in 1664, it became an English colony; the common law began the task of

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[918] STRYKER, *supra* note 48, at 264.

[919] Moreover, at least fifty-one, and possibly fifty-two, of these fifty-five signers were Protestants, avowing ideals of government akin to those of the English Puritans and Scottish Presbyterians.

[920] Some of the English-trained colonial American lawyers chose to be Tories, becoming refugees in the Caribbean. *See* 35 NOTRE DAME LAWYER 48, 76 (1959).

[921] See generally app. 17 of this book (arguing that legislative or executive control of the courts translates into the state's control of lawyers).

replacing the Dutch civil law in the hearts and minds of the inhabitants. Nevertheless, civil-law notions lingered in the minds and practices of the New York Colonials, permeating the colony and the thinking of its lawyers. During that time, one colonial wrote that lawyers practicing in New York mangle the noble English laws and effect treason toward the government.[922] By 1741, however, New York had imposed a three-year requirement of study and a four-year requirement of apprentice practice before allowing admission to the Bar. By 1748, the Colony of New York had an active Bar of common lawyers.

By 1770, Massachusetts required graduation from college before beginning law study, thereby improving the reputation of lawyers in Massachusetts. This early standard for admission into the study of law is now followed in most modern American jurisdictions: completion or near completion of four years of undergraduate study is required before beginning law school. Some American jurisdictions allow students to begin law school at completion of three years of undergraduate coursework.

§ 3.10.3
James Otis & the Writs of Assistance

It appears to me (may it please your honors) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamentals of the constitution, that was ever found on an English law-book . . . Let us see what authority [precedent] there is for it. No more than one instance can be found of it . . . and that was in the zenith of arbitrary power, viz. In the reign of [Charles II.] when the Star-chamber powers were pushed in extremity by some ignorant clerk of the Exchequer.[923]

The writings of James Otis, common lawyer and pamphleteer from Boston, sustained the cause of the American Colonials in their struggle against the English Parliament and Crown by providing arguments of deeper and more impelling force than did any other lawyer. Otis, in fellowship with his countrymen, set forth the Christian substance of the common law in his pamphlet *Rights of the British Colonies Asserted and Approved* (1764).

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[922] *See* LEONARD W. LABAREE, ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783, 382 (1964).

[923] *Massachusetts Spy* 29 Apr. 1773, at 3, cols. 1–3. Boston Superior Court Feb. 1761, *quoted in* STEVEN B. PRESSER AND JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 56 (1989). James Otis spoke these words, appearing before the Superior Court of Judicature of the Province of Massachusetts, while arguing against the Writs of Assistance as contrary to the common law.

Otis's most celebrated pamphlet, however, was *Writs of Assistance*: written in objection to the royal exchequer's (the king's taxing authority) practice of issuing general search warrants—known as Writs of Assistance—claiming to authorize search wherever and seizure of whatever the government, in its arbitrary whim, wants to search and seize. Because both Parliament and Blackstone's *Commentaries* denied that common law was applicable in the American Colonies, Parliament usurped common-law jurisdiction in the Colonies with the color of admiralty jurisdiction as an excuse to issue these infamous writs and to conduct unlawful searches and trials without the Jury.

As does our present Fourth Amendment, before a warrant issued, eighteenth-century common law required the officer seeking to search someone's property, had to show likelihood that evidence of a crime is at the location in question by swearing to his reasons, by affidavit, under oath, before a neutral and detached magistrate. By contrast, a criminal warrant for search in admiralty or maritime jurisdiction issued at the unbridled discretion of a mere clerk (bureaucrat); requiring neither a sworn statement nor showing of probable cause: likelihood that evidence of a crime is at the location in question.

The writs of assistance were general warrants in admiralty: capricious, intrusive, meddlesome, and unlawful. "Bad policy," says Morton Blackwell, "makes for bad politics"; these ill-advised writs were the crow bar that pried the precious American Colonies from England. "Paxton's case, more popularly known as the 'writs of assistance case' was possibly the most important legal event leading up to the War of American Independence. Sixty years later John Adams said of the case, 'Then and there the child of independence was born.'"[924]

These writs of assistance were also the foremost reason for inclusion of the Fourth Amendment in the Constitution. In a word, common lawyers birthed American independence on the common-law right of freedom from unlawful searches and seizures.[925]

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[924] STEVEN B. PRESSER AND JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 56 (1989).

[925] In our day, however, federal judges, at the behest of federal prosecutors, have whittled the Fourth Amendment down to a nubbin', telling defendants that their remedy for violation of their Fourth Amendment rights is to bring a civil rights action against government officers.

§ 3.10.4
American Liking for Common Law & Blackstone

Though the list of his honors and activities is long,
Sir William Blackstone was undoubtedly a dull man . . .
Blackstone . . . displayed an unflagging appetite for
hard work that characterized his entire career.[926]

In 1756, William Blackstone published his *Analysis of the Laws of England*,[927] based on his pioneering lectures on the common law at Oxford. Though Blackstone is better known for his later *Commentaries on the Laws of England*, his Oxford lectures and his *Analysis* were a necessary step toward developing his *Commentaries*, which have shaped American common law.

Though a respected common lawyer in England and a Member of Parliament admired in the American Colonies for his opposition to the Stamp Act, William Blackstone's time-consuming drive to plough the neglected ground of the common law as a Fellow of All Souls College contributed to his lack of success in private practice. In addition, upon appointment to a seat on the Court of Common Pleas, the independence of mind that grew from his time alone with the common law resulted in more reversals of his decisions on appeal than of any other judge on the bench with him.

The common law was a jealous mistress of Blackstone's time and energy, rendering him oblivious to political loyalties. The Duke of Newcastle, Secretary of State and for forty years master of political patronage in Britain, denied Blackstone's appointment to the Vinerian chair of law at Oxford. Though discouraging to Blackstone, the Duke's denial set in motion a concatenation, resulting in the writing and success of Blackstone's *Commentaries*:

> William Blackstone's failure to receive the chair of law at Oxford in 1753 was due to the fact that he did not give assurances to Newcastle of his political loyalty. Murray [Lord Mansfield] had supported Blackstone's claim and after it had failed advised him to settle at Oxford and give lectures to any of the students who would come and listen to him. The advice was good and Blackstone's lectures were

[926] 1 BLACKSTONE, *supra* note 12, at *Introduction*.
[927] WILLIAM BLACKSTONE, ANALYSIS OF THE LAWS OF ENGLAND (3rd ed. 1758).

> a great success. This led Mr. Viner to make a bequest of £12,000 in his will to establish a chair of English Law at Oxford and Blackstone was the first holder of the chair. This appointment gave him the opportunity to write his classic *Commentaries on the Laws of England*, which proved a best seller enabling him to make £14,000 from the eight editions published in his lifetime.[928]

Like Wyclif, William Blackstone believed, wrote, and spoke with conviction that the common-law tradition must be taught in England's universities, thereby breaking, or even replacing, the civil-law monopoly there.

Blackstone's instincts in favor of the common law still discomfort worshipers of the Enlightenment, the Greek thinkers, and the civil-law tradition. Well-studied in both the common-law and civil-law traditions, Blackstone saw that the common law is fundamentally superior in effecting personal freedoms and political liberties. Though unwitting, Blackstone built his *Commentaries* on the effects of Erasmus's Greek New Testament in England. In addition, just as Erasmus failed to foresee the effect his compilation of the Greek New Testament took on England, Blackstone, likewise, failed to foresee the effect his *Commentaries* took on America: both men, by publishing their works, struck matches in a timber dryer than they had realized.

He presented the common law as a whole law and aimed at teaching a general audience, spurring those prone to follow the legal profession to research specific areas in detail. Moreover, Blackstone presented the common-law tradition as though a gem of symmetry, discussing each face of the gem as a subject, while encouraging the reader to view that subject's relationship to the whole, an approach which modern legal education ignores. Modern law schools teach and examine each common-law subject in isolation, with scant opportunity for the student to lean back and consider the complimentary fit of each subject in the whole tradition.

In the spirit of the common law, Blackstone stressed facts and first principles. He likened the teacher of the common law to one presenting a general map, marking out the shape of the country, its connections and boundaries, and its greater divisions and principal cities. It is not the teacher's business, says Blackstone, to describe the subordinate limits, or

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[928] HEWARD, *supra* note 386, at 79–80. The Oxford students' hunger for Blackstone's lectures on the common law evinced any prestige Newcastle offered Blackstone by political patronage.

to fix the longitude and latitude of every inconsiderable hamlet. He ought, rather, to trace primary rules and fundamental principles to their fountain, weigh and compare these with the precepts of the law of nature, then explain them by reasons, illustrate them by examples, confirm them by undoubted authorities, deduce their history, observed their changes, and note any affect the history of the country has had upon them. Thus, "law in context," was an idea familiar to the eighteenth-century common lawyer. Further, characteristic of common-law procedure, Blackstone built lasting strength into his *Commentaries on the Common Law* by laying the foundations of history before framing the exposition of the common law's particulars on that foundation.

In his *Commentaries*, William Blackstone's conclusion concerning the common law in America reveals an English attitude providing a reason for the American Declaration of Independence. "[T]he common law of England, as such," wrote Blackstone, "has no allowance or authority there [in the American Colonies] . . . ."[929] Justice Story calls this deduction "manifestly erroneous."[930] Blackstone's denial of the common law's authority in America notwithstanding, his *Commentaries* influenced America in two respects. *First*, they provided an intelligible, crisp presentation of the common law, readily available in print for ongoing reference and rumination. Lawyer and layman alike consulted the *Commentaries*, which enabled quick grasping of their common-law rights and responsibilities. *Second*, while providing this knowledge to the Colonists, Blackstone's *Commentaries* told them that none of these common-law benefits applied in the Colonies, doubtless, moving some to indignation and determination to claim the common law's protection and benefits in spite of William Blackstone's erroneous opinion.

Blackstone's views concerning the inapplicability of the common law in the American Colonies reflected the view of many in England and influenced more to take his view. Notwithstanding, kind Providence used William Blackstone to root the common-law first principles deep into the consciousness of Americans. Despite any faults in the *Commentaries*,[931]

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[929] 1 BLACKSTONE, *supra* note 12, at 105. Respecting the application of the English common law, Blackstone places the "American plantations" in the same category as the isles of Man, Jersey, Guernsey, Sark, Alderne, and their appendages *See id.* at 102–05.

[930] STORY, *supra* note 89, at 64.

[931] Like unto all men, William Blackstone was fallible; unlike many men, he remained right-headed, holding fast to the controlling fundamentals of the common law. For example, concluding that the divine-right-of-kings doctrine is "wild and absurd," he writes, "Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England . . . is subject to limitations by parliament." 1 BLACKSTONE, *supra* note 12, at 203.

when casebooks necessary to the common law's observance of *stare decisis* were unavailable on the American frontier, Blackstone's *Commentaries* provided the guidance of first principles. The *Commentaries* continued to mold Anglo-American common law for well over another one-hundred years: between 1787 and 1890, American judges cited Blackstone more often than they cited any other authority.

The American, William Hammond, printed an 1890 edition of the *Commentaries* and, in addition, imported from England a shipment of 1000 copies to meet the increasing demand. The Preface of his 1890 edition says that Philadelphia printer Richard Bell made the first printing of the *Commentaries* in North America in about 1790, printing 1400 copies as prepublication orders. Bell's prepublication list included four governors, three lieutenant governors, and other prominent persons, including John Adams of Boston and Thomas Marshall—father of Chief Justice Marshall of the United States Supreme Court. Bell shipped the *Commentaries* to booksellers in New York (239 copies); Charleston, South Carolina (89 copies); Boston (60 copies); and various townships in Virginia (97 copies). The demand continued, moving Bell to print a second American edition in 1799.[932]

In 1783, R. Burn edited and published the American edition of Blackstone's *Commentaries* most frequently reprinted. By the decade of 1820, "[l]awyers . . . cited Blackstone in American courts as today they would cite opinions in their state's highest court. Blackstone's *Commentaries* had the authority of precedent . . ."[933] because frontier lawyers and judges had scanty access to recorded case opinions and Blackstone's *Commentaries* where an available summation of the precedents as the common law stood at that time. Further American publications include Christian (1822), Archbold (1825), Chitty (1827), Lee, Hovenden & Ryland (1832 and 1840), and Welsby (1844). Even after these editions, the American demand for the *Commentaries* continued unabated.

That Blackstone's *Commentaries* gave controlling direction to Abraham Lincoln's life is not far-fetched. While Lincoln was clerking at a general store in Salem, Illinois, a family of settlers passing through sold him a barrel for fifty cents. The barrel was of no account to the settlers; they needed money; Lincoln took a chance on the barrel, ignorant of its contents. Lifting it, it felt empty, but upon reaching into the darkness of

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[932] *See* Susan D. Csaky, *From the Law Library: Sir William Blackstone and His Commentaries on the Laws of England*, U. MO. COLUMBIA LAW SCHOOL TRANSCRIPT, Fall 1991, at 8.

[933] STORY, *supra* note 89, at xi.

the barrel's bottom, his fingers felt a few books, which turned out to be a set of Blackstone's *Commentaries* in four volumes. Upon reading them, Lincoln's life changed direction. His discovery of the common law inspired him with the idea of practicing law; he drank deep from the *Commentaries*.[934]

The foregoing undisputed facts concerning Blackstone's influence in our country and courts begs certain conclusions concerning our American view of common law. *First*, America is a common-law country by choice. Even when Blackstone, one of the greatest common lawyers in England, opined in his *Commentaries* that the common law was inapplicable in America, Americans took umbrage, insisted that it did apply, and applied it with vigor in American courts and against the usurpations of Parliament.

Second, though Blackstone's *Commentaries* denied the Colonists the protections and benefits of the common law, Americans were unwilling to throw out the baby (English common law) with the bathwater (Parliament's legislation), and trusted Blackstone's *Commentaries* respecting the first principles of common law. Americans knew and understood that most all Blackstone wrote of the common law in his *Commentaries* was good and true, but never accepted Blackstone's claim that it was not for them. The *Commentaries* focused the American frontiersman on the first principles of the common law, teaching that each person—whether jurors or judges, legislators or electors, executives or administrators—must test all pronouncements of law and acts of government against common-law first principles.

Third, by denying the common law's application in the American Colonies, England's Parliament, and even William Blackstone, forced those Americans desiring the freedoms of the common law to aggressively claim the common law as their own, and they did. The Americans' claim of England's common law formed the foundation of their break with England. For example, the Declaration of Independence cites English attempts to deny the Colonials' right to trial by jury by transferring prosecutions of Colonists to the civil law's admiralty courts.[935]

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[934] Although this story of Lincoln's discovery of Blackstone's *Commentaries* is well known, B.F. McClerren has reminded the writer that it remains uncertified, adding, "Whatever the source, it is certain that he [Lincoln] did study Blackstone."

[935] *See* THE DECLARATION OF INDEPENDENCE paras. 15, 20, 22 (U.S. 1776). Experience has shown that the absence of a true and impartial common-law Jury gives opportunity for state control of the outcome of cases, i.e., substituting the state's will for individual freedom.

The Americans' demand that civil law's admiralty jurisdiction remain limited to maritime activities so as not to encroach upon the jurisdiction of America's common-law courts lay behind the War of American Independence.[936] Thus, the Colonials forced England to recognize common-law rights, liberties, and protections in the American Colonies, such as trial by jury and self-government. The common-law tradition was the issue; taxation without representation, such as the Stamp Act, was but a symptom.[937]

Thus, in summary, America became a common-law country by aggressive demand.[938] Notwithstanding Blackstone's denial that the

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[936] Again, in our own day, the federal government seeks to extend admiralty jurisdiction, without constitutional authority, through a far-fetched understanding of Congress's phrase *navigable waters*.[936] Early on, under the doctrine that federal jurisdiction, although limited, is complete within the Constitution's limits, the Admiralty Clause signified territorial ocean waters navigable by ocean-going ships and inland waterways that were navigable, even if only with a dugout canoe.

Justice Story's zeal concerning the Admiralty Clause was well known. One frustrated lawyer said that if Justice Story saw someone toss a corncob into a bucket of water, Story would take admiralty jurisdiction over the bucket and the cob. Attorneys agreeing with Justice Story later argued that *navigable waters* embraced waters that one could make navigable, by adding more water (increasing volume).

Such definition, however, justifies federal jurisdiction over all moisture within and under the earth's atmosphere: it removes the Constitution's federal limits of jurisdiction. Story's interpretation allows water to become navigable, not by improving a body of water already in place, but by increasing water volume by altering the configuration of the channel or the indention in the earth—by damming or dredging—that confines the body or trace of water in question.

Thus, it is now said that navigable waters includes not only waters that could be made navigable, but also tributaries to those waters, all the territories that drain into or will drain into those tributaries, and all areas within that drainage basin that become moist at any season (wetlands), regardless of size.

This interpretation transforms constitutionally limited admiralty jurisdiction into an unlimited jurisdiction, thereby subverting the purpose of the Constitution to limit the jurisdiction of the federal government. Thus, the federal government claims regulatory power over all of the foregoing under the Admiralty Clause, effectively denying trial by jury to those seeking redress for government's violations of their property rights under the Takings Clause of the Constitution. *See* U.S. CONST. amend. V.

Admiralty jurisdiction is now said to extend further than Justice Story's water bucket and corncob. Nowadays, it reaches on through to the fellow having tossed the cob into the bucket to take jurisdiction over the cornfield from whence the cob came, the well from which the bucket of water was drawn, and the entire aquifer and drainage basin that feeds the well—in short, the entire continent.

[937] While a Member of Parliament, William Blackstone supported repeal of the Stamp Act, aimed at the American Colonies.

[938] See, *e.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776), wherein the signers declare that the mother country has violated the following common-law principles: paras. 7–8 (separation of powers: executive meddling with legislature), paras. 10–11 (separation of powers: executive meddling with courts), para. 14 (domestic employment of military forces without legislative advice and consent), para. 15 (executive attempt to subject the American Colonies to powers other than arising from common-law authority), paras. 16–17 (domestic use of executive military powers and violation of equal protection of the laws by holding

common law applied in the American Colonies, his *Commentaries*, and the distinctions they draw between common law and civil law in favor of the common law, were indispensable in establishing the United States, her identity, and her common-law tradition.[939]

Though Blackstone's conclusions in favor of the common law have brought accusations of prejudice for his own English tradition, one must consider that William Blackstone was among those common lawyers—including de Bracton and Cowell—who had also earned a university degree in Roman civil law. Of all men, Blackstone—as also de Bracton and Cowell—understood the difference between the common law and civil law and made his choice according to his well-informed confidence. Blackstone, throughout his *Commentaries*, articulated the reasons for his choice; on these reasons, America grounded her common-law tradition, established her identity, and thus, secured her future.

§ 3.10.5
Common-Law Homeland Security[940]

No Englishman can be truly loyal who opposed the principles of English law whereby the people are required to have arms in defence and peace, for mutual as well as private defence . . . The laws of England always required the people to be armed, and not only armed, but to be expert in arms.[941]

The Second Amendment is a clear, concise statement of the common law tradition's personal right to keep and bear arms, our foundation of national security. As the First, Second, Fourth, Fifth, and Sixth

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state agents above the law), paras. 19 (levying of taxes without legislative advice and consent), paras. 20–21 (denial of common-law trial by jury), para. 22 (supplanting of common-law protections by unlawful expansion of civil law's admiralty jurisdiction), paras. 23–25 (denial of fundamental common-law protections), para. 28 (practice of involuntary servitude), para. 30 (denial of the common-law right of petition).

[939] Nowadays, however, common law's authority in America suffers from lack of appreciation and even respect. If Americans lack the passion for the common-law ideals that motivated the Founders, America will cease to enjoy the common law's benefits: she must claim this birthright to enjoy its advantages. If America remains as complacent toward her common-law birthright as Esau was toward his birthright, the benefits of America's birthright will go, as did Esau's, to another.

[940] *See generally*, EDWIN VIEIRA JR., CONSTITUTIONAL "HOMELAND SECURITY" (2007) (providing analysis of the call for Americans to revitalize "the militia of the several states," according to the authority of the United States Constitution). *See* U.S. CONST. art. I, § 8, cls. 15–16.

[941] GRANVILLE SHARP, TRACTS, CONCERNING THE ANTIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA 17–18 (1782), *quoted in* LES ADAMS, THE SECOND AMENDMENT PRIMER: A CITIZEN'S GUIDEBOOK TO THE HISTORY, SOURCES, AND AUTHORITIES FOR THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO KEEP AND BEAR ARMS (1996) (British spelling in original).

Amendments, the Second Amendment is brief because when drafted, no explanation was needed:

> The Framers of our Constitution were born and brought up in the atmosphere of the common law, and thought and spoke its vocabulary . . . [W]hen they came to put their conclusions in the form of fundamental law in a compact draft, they expressed themselves in terms of the common law, confident that they could be shortly and easily understood.[942]

Therefore, "[t]he language of the Constitution," said Chief Justice Taft, "cannot be interpreted safely except by reference to the common law . . . as it was when the instrument was framed and adopted."[943]

Those who demanded and those who drafted the Second Amendment revered their English freedoms and knew well that the right to arms is a personal responsibility rooted deep in the common law. To know the Second Amendment in the context of our common-law tradition will correct its misrepresentation. "The laws of England," said Granville Sharp, "always required the people to be armed, and not only armed, but to be expert in arms.[944] In this responsibility, England's common lawyers took the lead. For example, during the threat of the Spanish Armada in 1588, the students and members of the English Inns of Court formed themselves into companies, armed themselves for the defense of their country, and trained themselves in swordsmanship and handling of firearms.

Later, students and benchers—having already, at the encouragement of Charles I., formed themselves into companies, perfected their horsemanship, and sharpened their handling of arms, —followed a graduate of Lincoln's Inn, Oliver Cromwell, into battle against the royalists. When Napoléon assembled flatboats at Boulogne to invade Great Britain, the barristers from the Inns again formed themselves into companies to repel the invaders. The Inns of Court proposed that their banners carry the phrase, *Retained for the Defense*.[945]

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[942] Ex pate Grossman, 267 U.S. 87, 108–09 (1925).

[943] *Id.* at 107.

[944] GRANVILLE SHARP, TRACTS, CONCERNING THE ANTIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA 17–18 (1782), *quoted in* LES ADAMS, THE SECOND AMENDMENT PRIMER: A CITIZEN'S GUIDEBOOK TO THE HISTORY, SOURCES, AND AUTHORITIES FOR THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO KEEP AND BEAR ARMS (1996) (British spelling in original).

[945] *See* STRYKER, *supra* note 48, at 260–61.

A decade before American Independence, Blackstone wrote that common law "judges do not pretend to make new law, but to vindicate the old one from misrepresentation." Thus, the wisdom of our Second Amendment is seen in light of the common law: government is without authority to trespass (infringe) upon the natural right and responsibility of the individual to arm himself in his own defense and that of his family, neighbors, and country.

Leading up to America's Independence, however, England's Parliament followed an unfortunate error of her leading, and otherwise great, lawyers. In "[o]ur American plantations . . . ," said William Blackstone, "the common law . . . has no . . . authority . . . ; they being no part of the mother country . . . [t]hey are subject to the control of parliament." From the false premise that the common law does not apply to the American colonials, Parliament reached a false and costly conclusion: Americans have no common-law right to keep and bear arms. Thus, at Lexington and Concord, England began her policy of aggression to disarm her Colonies. England's use of force, however, backfired; the resulting war fueled American resolve and sharpened her convictions to keep her arms. The American Colonists, putting all on the line, insisted that the common law Blackstone espoused certainly was their birthright. On the fields of battle from 1776 to 1781, the Colonists settled the question in their favor.

To the victorious Americans, the personal right to keep and bear arms had become more than a reasoned conclusion, it was a felt necessity. As they pondered a national Bill of Rights "the smell of gunpowder from Lexington and Concord," says Les Adams, "was still in their noses." Consequently, they forbade their new national government from infringing upon their personal rights to keep and bear arms. In addition, Americans saw that the Second Amendment gave teeth to their other personal freedoms in the Bill of Rights, encouraging boldness to freely speak, write, and associate. Indeed, the Second Amendment was theirs: they knew its meaning, had suffered long to earn its passage, and tolerated nothing less than each person's natural right to arms and private discipline in their use. Thus, without a hint of objection, they added the Second Amendment to the Constitution.

The common-law tradition had always understood rights as an individual and personal, not collective, matter. "[T]he public good," said Blackstone, "is in nothing more essentially interested than the protection of every individual's private rights." By this principle, James Madison structured the Second Amendment: the public good ("the security of a

free State") depends upon our keeping the private right "to keep and bear Arms" from infringement.

Justice Joseph Story, champion of our common law and Constitution, called the Second Amendment "the palladium" of our liberties "since it offers a strong moral check against the usurpation and arbitrary power of rulers."[946] Justice Story understood in his day the necessity of the Second Amendment, but also foresaw the great danger creeping toward it, the danger now facing us: a gradual undermining, a gnawing at its foundation of personal right—in a word, *infringement*. "There is," he said, "certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights."[947] Identifying the danger, Justice Story forewarns us; taking heed, we will fulfill the Second Amendment's purpose: real national security.

§ 3.10.6
The Mercenary & the Civil-Law State.

A mercenary is a combatant hired by, leased, or loaned out to someone other than the mercenary's own government to fight in a foreign war. The use of mercenaries, though found in the history of common-law countries, has never been a part of the common-law tradition. The mercenary fights on command for profit for himself, his master, or both. By contrast, the non-mercenary fights for his and others' rights; if he receives pay while doing so, he considers himself fortunate. In the past, the United States has neither employed mercenaries nor let her sons out as mercenaries. American submission to the will of international organizations, however, threatens this tradition.

Joseph Plumb Martin was once a young Continental soldier. As an old veteran of the American War of Independence, he recalled his discovery of the unburied remains of Hessian mercenaries[948] a full year after fighting in battle against them. He spoke in moral outrage of the servile condition to which statist mercenary trade had reduced the Hessians. Martin believed that the use of mercenaries is but symptomatic of the greater problem of state power over men. In hindsight of decades

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[946] STORY, *supra* note 89, at 708.

[947] *Id.* at 709.

[948] King George III., being Elector of Hanover, was a German prince. Thus, most of the Hessians were his direct subjects that he had conscripted and then leased to English service to help subdue her American Colonies.

past, Martin recalled his feelings upon discovering the remains of his Hessian foes, providing good rebuke for Americans yet to come:

> I, with some of my comrades who were in the battle of the White Plains in the year '76, one day took a ramble on the ground where we were then engaged with the British and took a survey of the place. We saw a number of the graves of those who had fell in that battle; some of the bodies had been so slightly buried that the dogs or hogs, or both, had dug them out of the ground. Their skulls and other bones, and hair were scattered about the place. Here were Hessian skulls as thick as a bombshell; —poor fellows! They were left unburied in a foreign land; —they had, perhaps, as near and dear friends to lament their sad destiny as the Americans who laid buried near them. But they should have kept at home, we should then never have gone after them to kill them in their own country. But, the reader will say, they were forced to come and be killed here; *forced by their rulers who have absolute power of life and death over their subjects*. Well then reader, bless a kind Providence that has made such a distinction between ***your*** condition and ***theirs***. *And be careful too that you do not allow yourself to be brought to such an abject servile condition.*[949]

The "abject servile condition" of which Joseph Martin speaks is that condition of those subjected to rulers that conscript their subjects' military services into the hand of a foreign power or under foreign officers. The Hessians fighting in America were under the power of George III.: not only a German prince, but also, king of England. Such a servile condition now threatens America's armed forces as our government lets out her sons for placement under the ultimate command of foreign officers of the United Nations.

General Washington forbade and prevented such practice by keeping under his ultimate command every officer placed over Americans. General Pershing took the same position during World War I: France demanded that American troops fall under ultimate French command, arguing that since the French had more experience fighting the Germans, American officers must relinquish command to French officers. Pershing

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[949] JOSEPH PLUMB MARTIN, A NARRATIVE OF A REVOLUTIONARY SOLDIER: SOME OF THE ADVENTURES, DANGERS AND SUFFERINGS OF JOSEPH PLUMB MARTIN 116–17 (New York, Signet Classic 2001) (1830) (italic and bold type in original).

refused France's demand, but eased her fears by affirming the Americans' commitment to victory. The Americans, said Pershing, under American command, will do alone in four months that which the English and French have failed to do together in four years.

§ 3.11
Common Law in the United States

In America, after the Revolution, it [the common law] prevailed over the prejudice of all things English, which for a time threatened a reception of French law, developed its doctrine of the supremacy of law . . . in the teeth of the strongest political influence of the time, and maintained its doctrine of precedent, involving the unpopular practice of citing English decisions . . . It is not too much to say that the common law passed through these several crisis with its distinctive fundamental ideas not merely unshaken but more firmly settled.[950]

The American common-law tradition is in fact Anglo-American, in that it came to North America from England. American law schools still study leading contract and tort cases from English common-law countries;[951] in so doing, they recognize that, although our legal tradition is our own, it is in continuity with the English common law. The American Colonies' demand that the mother country observe their English common-law freedoms gave direct rise to our independence.[952] Upon achieving that independence, the former Colonies harked back beyond Norman England, founding their common law and government more on that of the Anglo-Danes', than on that as practiced in England after the Norman Conquest.[953] The Anglo-Danes had held a higher regard for individual

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[950] ROSCOE POUND, SPIRIT OF THE COMMON LAW 6 (1921).

[951] See, *e.g.*, the following English case opinions traditionally read in American law schools: Winterbottom v. Wright, 10 M.&W. 109 (Exch. 1842) (providing the Winterbottom rule of negligence); Fletcher v. Rylands, 1 Exch. 265 (1866) (providing rules of strict liability in tort); Blandford v. Andrews, 78 Eng. Rep. 930 (Q.B. 1599), Fitzroy v. Cave, 2 Eng. Rep. 364 (K.B. 1905) & Dutton v. Poole, 83 Eng. Rep. (K.B. 1677) (English contract cases traditionally read in American law schools).

[952] *See e.g.*, § 3.10.3 of this book (discussing James Otis's resistance against the writs of assistance as a violation of the common law's bar against lawless searches and seizures, the sanctity of one's home, and the part Otis played in motivating the Colonies to independence).

[953] That the American conception of law and government is nearer the Anglo-Saxon understanding than is the common law and government of the post Norman invasion is the opinion of United States Supreme Court Justice James Wilson; the writer agrees. See generally §§ 3.4–3.5 of this book (discussing the common law before and after the Norman invasion of England).

rights and property, which Norman feudalism had diluted and over which parliamentary supremacy had then gained power.

After England's invasion of the American Colonies and American independence, English disrespect fostered hard feelings between the two countries, which lingered and gnawed. All during these times—before, during, and after the American War of Independence—the British failed to assuage American animosity but, instead, exacerbated it by kidnapping and impressing into royal naval service American seamen on the high seas. The British refused to remedy their contempt, Americans demanded action, and, in 1812, the young Speaker of the House of Representatives Henry Clay, persuaded Congress to declare war.

The British, invaded the United States with further crude atrocities, setting American disappointment in England even deeper. Though spirited with fresh independence,[954] frustration over lack of English respect burdened the Americans. Consequently, American antipathy toward England grew into a popular mania then reared up into a fright-filled foreboding of all things English, including, most of all, the common law.[955] As American dislike for their inherited customs and traditions

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[954] One achieves true independence from other men only as one develops total dependence upon God; total dependence upon God for salvation's provision is total independence from the oppression of men.

[955] The life of Andrew Jackson is a prime example of American antipathy toward everything English. Although Jackson later practiced as a common lawyer and served as a judge, his unfortunate experience with the British began, when, at age fourteen, a British officer slashed Andrew Jackson's forearm and face—at the time an unarmed and helpless prisoner—with his sword. Over the decades, Jackson's disdain for the English waxed bolder, culminating in his annihilation of British troops in the Mississippi River bottom, below New Orleans.

During the War of American Independence, the British took Jackson, at the tender age of fourteen, along with his older brothers, prisoners of war. Because the British held the boys under deplorable conditions, Jackson's mother requested from the British permission to tend to the needs of her sons. The British treated her disrespectfully; she contracted an illness from her visits that proved fatal. Then, because Jackson refused the order of a British Officer to shine his boots, in anger, the officer drew his sword and took a swing at Andrew's face. To block the blow, Jackson threw up his forearm, receiving a severe slash across his forearm and face. This stupid act by an arrogant British officer ignited a resolve in Andrew Jackson that found its final release in the 1814 utter decimation and humiliating defeat of British troops at the Battle of New Orleans: the same fine troops that had defeated Napoléon Bonaparte at Waterloo.

From his boyhood experience as a prisoner of war forward, Andrew Jackson lacked tolerance of the British. He was intent, by his own initiative, upon banishing British presence and influence from American soil. For example, Jackson, having heard that British troops had entered Florida, without awaiting presidential authority, led the Tennessee militia into Florida to drive them out. In 1814, during the War of 1812, Jackson set out with the Tennessee Militia for the port at Mobile to encounter the British. However, while in route, he received intelligence that aboard the British ships preparing to land troops were the British officers' wives. Knowing that only New Orleans and not Mobile provided the officers' wives opportunity for fine dining, Jackson concluded that the British

swelled, revolutionary activists worked loathing of the common law into scorn and then panic, festering hatred of common lawyers—upon whom blamed finally fell.

To aggravate circumstances, after the year 1800, the Napoléonic wars cut off the American States from foreign trade, reducing their commerce to trickles. Little commerce meant little litigation and, consequently, little need for lawyers. By the time of America's War of 1812 with Britain, Americans saw the common law and common lawyers as unneeded, and even dangerous.

Thinking the times ripe, the anti-common-law (i.e., pro-civil-law) faction moved to supplant the common-law tradition by persuading the American States' legislatures to enact the civil law in a form akin to the French *Code of Napoléon*—such as Louisiana had enacted in 1825.[956] Kentucky and Pennsylvania, caught up in the mania, forbade lawyers to cite English court cases. Kentucky then went further and introduced legislation to repeal her common law; due to the work of Kentucky's common-law champion Henry Clay, the bill failed by one slim vote.

Some States, upon admission into the Union, escaped the mania; others did not. None, however, fell to the civil law. In 1818, Illinois, at admission into statehood, made her choice by adopting the common law as it stood in the fourth year of the reign of James I.—to agree with the founding of Jamestown in 1607, the first permanent English settlement on American soil. Missouri, upon admission into statehood in 1821, also adopted common law, but due to the anti-English spirit of the times, not unanimously. Missouri's controversy over adoption of the common law is noteworthy because Missouri was no stranger to the civil-law Code and

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intended to land in New Orleans, and, therefore, turned his head from Mobile to New Orleans.

Jackson, upon his arrival, set up military headquarters and placed the vicinity under marshal rule. Jackson was primed for an ultimate showdown with the British; upon being informed that British troops had disembarked and encamped down river from New Orleans, Jackson slammed down his fist on the table beside him exclaiming, "They will *not* sleep on our soil!" Jackson then hastened to impress every able-bodied man into service. Even a riflemen company of lawyers quickly formed and took their position toward the far end of the American bulwark, extending from the Mississippi River and across the bottoms perpendicular to the River's channel. The British fought bravely that day, but to no avail.

When Jackson became President, his political opponents criticized him for conducting the Presidency in the spirit of the civil law: by imperial command. Among these critics, the most vocal was congressman David Crockett. Crockett referred to President Jackson as *the Government*, and vowed never to live under *the little Flying Dutchman's kingdom* (Vice-President Martin Van Buren). Crockett then left the United States for Texas and perished in defense of the Alamo. *See* XXV *The Magazine of History*, July 1917, at 75–76, *quoted in* DAVID CROCKETT, DAVY CROCKETT'S OWN STORY 238–40 (1836).

[956] See generally § 2.13 of this book (discussing the events leading up to the enactment of the civil-law Code in Louisiana).

tradition: forms of both the Spanish and French civil-law codes had governed the State's people.

In the eyes of men such as Justice Joseph Story, the danger of civil law taking root in the American frontier settlements posed the greatest of threats to American freedom, moving him to urgency. While teaching at Harvard Law School, he beseeched his students to go into the Northwest Territories and other frontier settlements to plant the common law and government before civil law put down its tangle-footed roots. Justice Story's students responded to his admonition to plant the common law on the frontiers; some migrated into Connecticut's 126-mile-wide land grant, originally stretching from Connecticut's Atlantic seaboard clean to the Pacific Ocean. First called *New Connecticut* and later *Western Reserve*, Congress at last incorporated this land into the Northwest Territories. In 1826, in the Western Reserve, Story's students founded Western Reserve College, which in 1967 merged with the Case Institute of Technology (founded 1880) to form Case Western Reserve University.

Nevertheless, just as Renaissance, Reformation, and Reception of Roman law—Maitland's three R's—never shook the hold of the common-law tradition on England; elitism, egaltarianism, and English-phobia never shook the hold of our common law on the American States.

§ 3.11.1
The American Common Lawyer

The role played by Roman law in shaping the thinking of American jurists and in the development of substantive law in the United States can be easily exaggerated . . . In the [United States] Supreme Court . . . Roman law was always peripheral and served, at most, as a backdrop or counterpoint to American common law.[957]

American fear of English customs and institutions—called Anglophobia—gave opportunity to the preachers of egalitarianism: the insistence that all men must be deemed of equal ability in every area of endeavor.[958] In

[957] M.H. Hoeflich, *Roman Law*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1992, at 742 (Oxford, 1992). For all its subversion, Roman law severed only to strengthen American common law.

[958] The egalitarian theory insisting that all men are of equal ability differs from the doctrine that teaches that all men are equal. All members of Adam's race are of equal and inestimable worth in God's eyes because all men bear the stamp of God's image. Further, all men are of equal worth because sin, having leveled every person, before the law of God and our own laws all stand equal.

On the other hand, to say that all are equal in all things is different from saying that all are of equal *suitability* for all things; or that the ideas of all are of equal value. Because all men are of indistinguishable worth before God, Scripture commands that we honor all men

the East, the self-appointed intellectual elite, in reckless disregard of all, used egalitarianism to excite rebellion among that ever-growing and vulnerable throng arriving from the Old World.

Egalitarianism never appealed to the frontiersman and rural rustic left in his wake. Anti-elitism, however, did root deep among those that pressed west to the Alleghenies and beyond, resulting in the near riddance of any qualifications for entry into the practice of law. As a rule, the frontiersman never held himself to be better than any other, but he did hold himself to be just as good—that is, of equal dignity and worth—, a biblical position. During the first half of the nineteenth century, in many places from the eastern-fall line of the Alleghenies to the western reaches of the Mississippi Basin, the only requirement for the practice of law was a fellow's willingness to use the dose of good sense that God had given him.

Moreover, early on, from the eastern slopes of the Alleghenies and in all parts west, even if a fellow yearned for formal education, schools were unavailable. Any education requirements for lawyers were impracticable if not impossible to attain; apprenticeship was the only available method of learning the practice of law.[959] Many Americans came to loathe any group considered privileged, including lawyers.[960] Consequently, those migrating into the frontiers often demanded that no person desiring to practice law be barred from doing so due to lack of education. Any barriers to the practice of law (it was believed) were arbitrary and aimed at immoral protection of the few at the expense of the many.

The frontier's scorn for elitism clung into the twentieth century—and still clings; vestiges remain in rural America, especially between the Alleghenies and the Rockies. For example, Indiana, until 1933, kept constitutional provisions discouraging entrance requirements for the legal profession. Such American ideals of classlessness—a rural point of view now fast fading in the face of evolutionary dogma—comprise two convictions: every man is worthwhile, even if only in his own peculiar

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as equals. God never varies in His respect of persons; therefore, neither must we. God, however, does distinguish between good ideas and bad ideas; therefore, we must also.

[959] Lest any place too much faith in formal academic legal training, apprenticeships have made the greatest of lawyers. For example, William Blackstone and those common lawyers leading the colonial American Bar were products of the mid-eighteenth century English Inns of Court, where almost all learning was by live observation and practice, and the student read law—Littleton, Coke, and case opinions—instead of listening to lectures.

[960] *Elite* is from a French root denoting the "elect." As a Latin verb, this term retains the prefixed preposition *se-* for "apart" forming *s*elect. The *elite* (elect or selected ones) are those singled out and set apart from among the many.

way; formal education, being elitist, has ruined two callings, *lawyering* and preaching.[961]

To fully grasp the trend of the common law planted as the American frontier pressed westward, one must acknowledge the raw influence of the frontier preacher. Country folk living on the edges of the wilds had less opportunity to enjoy the divisions of work that those living closer together in parts well settled. Thus, depending upon themselves for every needful thing, the frontier folk had little time to focus their energy. Moreover, when their self-sufficiency failed, they had no one to turn to but God, and they often did.

Trained clergy being scarce, they turned to God's written Word for strength and guidance. If they did have access to a preacher, the preacher's only authority was, likewise, the Bible, understood in straightforward terms. Indeed, he seldom had any other book. Further, when the frontiersman sat in the Jury box and drew from his conscience in forming his verdict, out came the sentences of Scripture. Even if he never learned to read, the phrases of the King James Version were in his mind and directed his sense of right and wrong. Thus, it stands to reason: the frontier lawyer's only hope of persuading the Jury was to know the Scriptures and from them reason. Thus, lawyers learned by heart, not only Blackstone's *Commentaries*, but also the sentences of the King James Version. Still yet, as any Midwest country lawyer knows, in summing up to the Jury, the Bible carries weight.

Over time, the common law on the American frontier gathered in layers of Jury verdicts, each verdict arising out of the Jury members' fellowship of common sense, which was fed by two branches: the sentences of Scripture, by way of personal reading and the hearing of preaching, and the common law according to Blackstone, by way of the lawyers bringing evidence and persuasion before the Jury.

Both the frontier clergy and the frontier lawyers were without opportunity of formal education. Church denominations had traditionally required that clergy complete four years of undergraduate training (college) and three years of seminary study. These opportunities being unavailable west of the Allegheny Mountains, preachers (the clergy) began their service without having gotten formal education. For example, around 1810, the Cumberland Presbyterians emerged on the frontier as a separate denomination because the established Presbyterian Church demanded formal education before a clergy candidate's

[961] Settlers west of the Alleghenies scarcely called churchman *clergy* or *pastor*. Only in recent decades have these terms decisively replaced "preacher."

ordination, and demanded his ordination before he administered the Lord's Supper. Because, however, the Presbyterians' were unable to provide enough ordained clergy for their congregations on the frontier during the Second Great Awakening, unlicensed Presbyterian preachers in the wilds of the Cumberland Mountains administered the Lord's Supper. The Presbytery back east sanctioned them, but still failed to send enough educated and ordained men into the backwoods. Thus, the Cumberland Presbyterians formed themselves into a separate group.

Formal education being unavailable on the frontier, to fill the need for trained clergy, the apprenticeship method of training flourished and for good reason: it provided advantages over institutional study, such as practical, close, and frequent dealings between teacher and student. Capable churchman and common lawyers received their training by this method. Indeed, America owes much of its Christian and common-law traditions to the work of early leaders taught through apprenticeships.[962]

Few educated men were willing to endure the frontier's hardships and risks when easier, safer, and lucrative positions were available in settled areas.[963] Christian denominations with an unbending demand that their clergy receive formal education, languished west of the Alleghenies; while denominations willing to meet the need as best they were able, flourished on the frontier. Evangelists, preachers, and circuit riders without formal education and armed only with their Bibles went into the wilderness, where they met success. The churches they planted allowed men without formal education to preach from the Bible, the only authority available

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[962] Churchmen such as Samuel Helffenstein trained and educated many a young man by apprenticeship. John Winebrenner is one of many examples of Helffenstein's students trained through apprenticeship to be mighty in the Scriptures. Winebrenner, raised on a Maryland farm, after attending Dickinson College for a short time, traveled to Philadelphia to board with and receive theological training under Samuel Helffenstein, pastor of the Race Street Reformed Church. At that time, the German Reformed Church had yet to begin a seminary; the personal instruction of young men by men such as Heleffenstein, however, was as effective. During Helffenstein's Philadelphia ministry (1799–1831), he trained twenty-seven men for Christian service as teachers of God's Word. JAMES I. GOOD, HISTORY OF THE REFORMED CHURCH IN THE U.S. IN THE NINETEENTH CENTURY 19 (1911).

Hebrew was Helffenstein's favorite subject; he prepared Winebrenner well. Winebrenner stressed that Christianity must be a personal and direct experience with God through Christ, and that the Bible teaches government of the Church by an eldership. Winebrenner also published *Compendium of the Heidelberg Catechism: or, Method of Instruction in the Christian Religion—as the same is taught in the German Reformed Church and schools in North America.*

[963] Jonathan Edwards (1703–1758) has been called the greatest mind America has produced, "The greatest philosopher-theologian, says Perry Miller, "yet to grace the American scene." Yet, Edwards responded to the call of hardships as pastor and missionary to the Indians in the frontier town of Stockbridge, Massachusetts before becoming, in 1757, President of Princeton College.

for faith and practice; thus, the rough-and-ready Christian faith they planted and tilled, put down roots and grew. Likewise, the frontier courts allowed men without formal education to plead principles from Blackstone's *Commentaries*, the only authority available for the common-law. In short, the rough-and-ready first principles they planted and tilled, put down roots and grew.

Thus, in the expanding West, lawyers, as well as the clergy and even medical doctors often forewent formal education. By about 1840, though without formal literary or legal education, a capable class of rustic lawyers had developed west of the Alleghenies. Nonetheless, redeeming properties filled the void of formal training, among which was a devotion to dredging from Blackstone's *Commentaries* creative and earthy applications of the common law's first principles. Just as lack of available theology books forced the frontier preacher to focus on the first principles of Scripture, lack of available legal literature forced the frontier lawyer to focus on the first principles of the common law.[964] The common-law tradition took firm root in the American frontier and took on its then peculiar character akin to the common law of pre-Norman England because the western territories allowed the one determined to practice law without having obtained a formal education to do so. Thus, the common-law—guided by Blackstone in first principles and by common sense in application—became an obtainable possession for all, and thus unassailable.

Legal education was scanty, but on the other hand, the common law being—as it still is nowadays—fact driven, and not law driven, the lawyer needed to know only enough to deal with the case at hand. Thus, most frontier lawyers made their law practice by learning to prosper in the rough-and-tumble world of frontier law. Most of actions at law on the frontier sounded in real property rights and tort: disputed land rights, assaults, and batteries. Andrew Jackson was such a self-trained lawyer, who without formal schooling, began to learn the common law by practice in court at Salisbury, North Carolina. In 1788, he became Solicitor for the territorial government of Tennessee.

Even without formal legal education, in all periods of American history, lawyers have raised other obstacles to the practice of law. For example, in Illinois's early days, even though admission to the Bar was easy, the ability to draw pleadings in a form acceptable to the courts remained a formidable barrier to practicing law. To be a member of the

[964] See generally §§ 5.3–5.3.1 of this book (discussing the primacy of first principles in lawyering).

Bar but ignorant of how to fashion pleadings kept a lawyer from gaining a hearing for his client—he was unable to practice law. Abraham Lincoln was fortunate to find a lawyer willing to teach him the acceptable forms of pleading. Knowledge of how to draft pleadings had also remained a barrier to the practice of law even in Massachusetts until Joseph Story, as a young lawyer, published a book that revealed, in simple terms to all willing to read, the proper forms of pleading in Massachusetts. In so doing, he removed a barrier to the practice of law in Massachusetts's courts; in response, the Massachusetts Bar established a Bar exam.

During this early period of our history, sometime between 1840 and 1850, a young candidate for Bar admission tracked down Abraham Lincoln, hoping to gain the recommendation required for admission to the Bar. During those days in Illinois, the one official requirement for Bar admission was recommendation by a licensed lawyer in good standing. Early one morning, the young candidate caught up with Lincoln shaving in a boarding house out on the prairie vastness of the Illinois' eighth judicial circuit, where Lincoln spent most of his days. After hearing the young man's request, and as he continued shaving, Lincoln began his interview, "What have you read young man, that is, beside the hairs on the nap of your neck?" "Blackstone," the candidate replied. "You claim you can read; now we will see if you can write," Lincoln said. "Take this down on a piece of paper and I'll sign it: 'I recommend this young gentleman for admission to the practice of law in Illinois. He is a good deal smarter than he looks.'"

Admission to the Bar was that trouble-free. The real barrier to the practice of law in Illinois was learning the forms and rules of writing pleadings.[965] Such straightforward ease of Bar admission in Illinois and other States continued until about 1870. Nevertheless, from 1840 to 1870, America produced outstanding common lawyers, some having never set foot inside a college, much less a law school. Of these men best known for their prowess in court and before the Jury, some even lacked

[965] Abraham Lincoln, after his experience in the McCormick reaper case (McCormick v. Talcott, 61 U.S. 402; 1857) with his future Secretary of War, the learned Edwin McMaster Stanton, foresaw growing competition among lawyers moving from the eastern states into the frontier territories and, thus, greater barriers to the practice of law. Stanton, after meeting Lincoln for the first time, was appalled at the manners and ways of the frontier lawyer, calling Lincoln "the original ape." *As told the writer by* lawyer Lewis Stanton Dotson, descendant of Lewis M. Stanton. At this writing, Lewis Stanton Dotson has practiced law for forty-five years in the rural Illinois counties where Lincoln practiced. Mr. Dotson has asked this writer to add that he disagrees with his great-great grandfathers' policies.

detectable time in grammar school.[966] This American experience has demonstrated that little is much when truth is in it; such was the key to the effectiveness of the intrepid frontier lawyers.

In those rural parts beyond the eastern seaboard, however, enforceable standards of conduct for lawyers remained largely nonexistent. In time, nefarious men with nefarious habits, seeing lawyering as a license to make money without fear of consequences, became lawyers. Before long, lawyering was indistinguishable from any other trade, such as a miller or blacksmith, in that the only remedy one doing business with a crooked lawyer had was an action for breech of contract. Remedies for breeches of fiduciary duties, such as disloyalty, breach of confidences, and ineffective assistance of counsel, were unenforceable. Since 1870, a slow but steady progress of standards occurred, until the American Bar Association, between 1905 and 1908, drafted and recommended a code of legal ethics fairly following that of the old English Inns of Court, where the American common lawyer's roots remain—legislative opposition in the separate States against these standards notwithstanding.[967]

In 1911, the Association of American Law Schools, working through the American Bar Association, encouraged formal legal education. Its guidelines required all candidates for the practice of law to complete three years of college and three years of law school, which remains the minimal requirements in several jurisdictions. Nowadays, American States require Bar candidates to also pass a Bar exam before allowing them to practice law. Wisconsin also requires Bar candidates to pass its Bar exam, excepting the candidate that has graduated from an ABA[968]-approved law school in the State of Wisconsin.

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[966] Because the foundation of the common-law tradition is God's Word and because English is the language of the common law, mastering the English Bible helps one to understand the common-law tradition. Moreover, to master the English Bible like as one masters the facts of his own case, is to experience its benefits of discipline and wisdom. Mastering the English Bible does not mean that one must understand all aspects of God's Word: an impossible task. It does mean, however, that one is familiar with the biblical characters, their speech, and their behavior; the Holy Spirit will apply further understanding as needed. *See generally* JAMES M. GREY, HOW TO MASTER THE ENGLISH BIBLE (1951) (1906) (presenting one man's experience in discovering the method and personal advantages of mastering the English Bible; having thoroughly grasped the concept, James M. Grey reduced his experience to simplicity). To master the English Bible is to be mastered by it.

[967] *See* 178 MINN. L. REV. 331.

[968] ABA is the acronym for the *American Bar Association.* ABA membership is non-compulsory for those licensed to practice law. However, the ABA's political policies have moved many lawyers to withdraw their membership or refuse to join. Thus, due to decreased membership, the ABA has lost the clout necessary to enforce its policies. In short,

§ 3.11.2
Dueling:
American Vestige of Trial by Battle

Upon the Jury's verdict against him, the early Anglo-Saxon had the power to appeal from human courts to God through trial by ordeal. The Norman's appeal to God from human courts was through trial by battle, if one's opponent accepted the challenge; but if he ignored or refused the challange, he lost by forfeiture. Trial by battle applied to private disputes and required two willing parties. By the middle of the fourteenth century, trial by battle had ended in fact; Parliament, however, neglected its official abolition until 1818, by which time any sense of appealing to God was forgotten. Trial by battle, nevertheless, continued into nineteenth-century American politics as a chivalrous custom through dueling.

In Britain's early centuries, men conducted trial by battle on points of personal honor, most often involving disputes over land. In America, dueling tended to concern materially smaller, yet legally actionable, points of personal honor, such as slander or abuse of legal process. Andrew Jackson, Charles Dickinson, Aaron Burr, and Alexander Hamilton are well-known participants in this dangersome way of settling

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the ABA arose, served our country for decades, and now, due to poor policy, has forfeited its authority and power.

We lament that the ABA no longer serves a good purpose. Its demise, however, was predictable. History speaks with clearness: any organization that men form for good seldom works for good more than about a century. Exceptions occur and we are glad for them, but the technique of the forces of evil prowling afoot in this old world is not to begin their own organizations, but to steal those that others have formed for good.

From charitable foundations, to churches, missionary societies, Bible societies, political action groups and Bar associations, evil reaches its goals by infiltration, stealing of control, and thwarting an organization's worthy purposes by neutralizing its effectiveness, while keeping up appearances that the organization's original mission remains. By this deceit, the usurpers divert the financial resources of those giving their support to evil purposes.

Since coming into being, common lawyers have been the natural first-line guardians of the common-law tradition—not always by deep understanding, but by their keeping alive the common-law adversarial tradition through the Jury trial. Common law is best enlivened and known in its doing, not in its theory. The chief feature necessary to their calling is single loyalty to the eternal majesty of the law. As Bar associations and law schools further lose sense of the common-law tradition, common lawyers, to serve their calling, must remain independent in their loyalty to the law above any political policies of organizations claiming to represent their convictions.

As long as the ABA held fast to the principles of the common-law and the Constitution, America's common lawyers wielded their combined power for good. However, by upholding the common-law principles and the Constitution, the ABA upheld ideals consonant with biblical faith, intolerable to the faithless.

differences. Jackson had been shot in duels so many times that folks said he "rattled like a bag of marbles."[969]

During the early nineteenth century, however, an attitude of social reform arose in America, producing a growing antipathy toward the custom of dueling with swords and pistols. Although condemnation from American pulpits of the tragic death of Alexander Hamilton in his duel with Aaron Burr in 1804 soon ended the popularity of dueling in America,[970] dueling lingered into the mid-nineteenth century. Two noteworthy attempts at dueling—lesser known because they were never carried through—were John Pickering versus Thomas Jefferson and James Shields versus Abraham Lincoln: President Jefferson ignored Judge Pickering's challenge; Shields and Lincoln settled their differences after squaring off with swords, but before carving up one another.

John Pickering, United States District Court judge and former Chief Justice of New Hampshire, challenged President Thomas Jefferson to a duel. Judge Pickering was a member of the Federalist party; President Jefferson was determined to remove from office every Federalist judge possible by any means available. Thus, Jefferson accused Judge Pickering of wrongful exclusion of evidence in an admiralty case, unlawful dismissal of the same case, and swearing from the Bench, all while drunk. By a 45–8 vote, the House of Representatives impeached Judge Pickering. Following Pickering's impeachment, but before the Senate, however, began His trial, Judge Pickering challenged President Jefferson to a duel, demanding that he was entitled to trial by battle. Jefferson ignored Pickering's challenge, and the Senate convicted the honorable Judge on a partisan vote, *in abstentia*.[971]

In a second case, James Shields, a hot-tempered West Point graduate, challenged Abraham Lincoln to a duel; at that time, both men lived in

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[969] Jackson, all his life, suffered infection and great discomfort from his wounds, especially from the ball that Dickinson put next to Jackson's heart, making removal too risky to attempt. After that day, Jackson carried a never-ending infection in his chest. Jackson, knowing Dickinson had proven himself a faster hand and deadlier shot with a pistol than he, still challenged Dickinson. Thus, Jackson also knew it was senseless to try firing first. Jackson decided to let Dickinson fire first, resolving to stay alive and standing just long enough to take slow, steady aim while Dickinson reloaded. Jackson's strategy worked, but for the rest of his life he paid for his victory with untold suffering. Dickinson, straight away at the signal, fired; true to his reputation, his shot found its mark in Jackson's breast. At the ball's impact, witnesses said a puff of dust popped from Jackson's heavy coat; as his lanky frame reeled a bit from the force of the blow, his empty left hand shot up then came down and clutched his breast. Then, Dickinson watched in unbelief as Jackson doubled over forward for a few seconds, slowly straightened himself and raised his weapon, took deliberate aim, and fired the mortal shot. Jackson then fell to the ground.

[970] *See* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF GOVERNMENT 457 (1974).

[971] *See* P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA 1635–1805, at 207–17 (1984).

Springfield, Illinois. Mr. Shields was a democrat; Lincoln was a Whig. Shields and Lincoln were at political odds; circumstances had heightened Shields's sensitivity to criticism. Next to Steven Douglas, Shields "was the most prominent Democrat in Illinois."[972] Due to the massive immigration of Democrats from Kentucky's Bluegrass basin into downstate Illinois, the Whigs in Illinois were losing influence. Shields, formerly a Whig and ambitious to become State auditor, had switched parties from the Whigs to the Democrats.

Shields won the election and was State auditor when, in 1842, the State Bank of Illinois failed. Shields, in response, issued a directive prohibiting the State of Illinois from accepting notes from the bank in payment of taxes. Shields's prohibition, however, frustrated the hard-working prairie farmers because the State government had persuaded them to back the State's issuance of the bank's charter and to entrust their money to the bank.

Shields, having opened himself to criticism, accused Lincoln of authoring libelous newspaper articles concerning Shields. Lincoln, though innocent of the accusation, accepted responsibility for the articles in order to protect the identity of the authors, one of which was his wife to be, Mary Todd, and the other, was her accomplice friend, Julia Hayne. Mary and Julia had publicly poked fun at Shields in the *Sagnamo Journal*. Unlike many of the Kentuckians that had migrated into downstate Illinois, Mary Todd was a Whig:

> Mary Todd's family had been prominent Whigs and close associates of Henry Clay before immigrating to Springfield from Lexington, Kentucky. Mary and Julia Hayne authored letters to the local *Sangamo Journal* under the name of "Rebecca," a crude but shrewd countrywoman who poked fun at Shields. Mary Todd and Julia Hayne showed one of their letters to Lincoln, hoping he would help sharpen the barbs; Lincoln may have made some suggestions. Mr. Shields was a sanguine-blooded Irishman who demanded that the editor at the *Sangamo Journal* reveal the author of the articles. In order to protect the identity of the two girls Lincoln maintained that he was the author. This was the reason for Shields's challenge.[973]

[972] Letter from B.F. McClerren to Brent Winters (17 May 2005) (on file with author).
[973] *See id.*

Shields, convinced that Lincoln had authored the libel, delivered his challenge for a duel and Lincoln accepted, but pointed out that the Illinois legislature had outlawed dueling within the bounds of the State. Shields, however, said he knew of an island in the middle of the Mississippi channel that neither Illinois nor Missouri claimed; we will duel there, said Shields. It being customary for the challenger to allow the challenged to choose weapons, Shields asked Lincoln to choose. Trusting to his longer arms, Lincoln chose swords. Then Lincoln, knowing that West Point had trained Shields with swords, engaged another West Pointer living in Springfield to give him a few sword lessons. On the appointed morning, both combatants arrived on the island and squared off for battle. Fortunately, friends of Shields and Lincoln (called *seconds*), having agreed to insure that the combatants fought according to fair play, stopped the affair before battle began.

§ 3.11.3
Separation of Powers:
Common-Law's Standard

The greatest scourge an angered Heaven will inflict upon an ungrateful nation, our Founders held, is courts with judges dependent upon others in government, or executives and legislators that blindly follow the opinions of judges. Dependency upon other men indicates unjustified fear of displeasing others in place of the only One worthy of one's dependency. In fulfilling the duty of independent judgment, Scripture and the common-law tradition demand that everyone respect magistrates and office holders: neither speaking evil of them,[974] nor seeking to harm them. In the common-law tradition, there has never been a right of *revolution*, as the civil-law tradition understands that term. The common-law tradition respects the speaking and doing of truth as the means and result of freedom; the civil-law tradition encourages revolutionary (rebellious) speech and acts, touting these to be the means and result of freedom, but these are the means and outcome of bondage.

Justice Story recognized common-law government's adversarial tradition working between the branches of government to be the remedy for the inborn defect in legislative power, "Sidney has said with great

[974] *See Exodus* 22:28: "You shall not speak lightly of judges and shall not curse the ruler chosen [נשׂיא (*nasi*): from the verb נשׂא (*nasa*) meaning, "to lift up," i.e., the *one* lifted up, thus, ordained] among [ב: *beth*] your people." The preposition in this verse (*beth*) is telling: men are not to choose judges and rulers to stand "out from" the people, to be venerated as *wholly other*; rather, they are to remain *among* (*beth*) the people.

force, that the legislative power is always arbitrary, and not to be trusted in the hands of any, who are not bound to obey the laws they make." The remedy is not to trust in the goodness of any man that may get elected or appointed to office, but to structure the relationships between the powers of government in such a way so as to set them in tension, one against the other. "[T]he only effectual barrier against oppression, accidental or intentional," said Story, "is to separate . . . operations, to balance interest against interest, ambition against ambition . . . ."[975] We, therefore, must maintain our government in such a fashion as to insure that the unavoidable selfish interests and ambitions of those in government work to our good by pitting such self-centeredness individuals against each other. We will keep our government conquered and in our service, as long as we keep it divided according to the common law's separation-of-powers principle.[976]

In the common-law tradition, the three branches of government are ordained by the eternal law, born of organic law (the Constitution) as coequal triplet siblings, dependant upon that law for their being, and each independently answerable to God, the ultimate lawgiver, for their actions. For example, the Supreme Court (judicial branch), President (executive branch), and the Congress (legislative branch) are the direct, simultaneous, and coequal creations of the law as expressed by the Constitution. In the civil-law tradition, the offices of government are understood as creatures of the state embodied in men as legislators, whether a legislative body or a legislating demagogue. Since the civil law views the legislators as the masters of all offices of government, it follows that those occupying these offices answer to the legislators.

Both common law and the civil law believe that the judicial, executive, and legislative powers all stem from a country's sovereignty. The different sources of that sovereignty bring a vastly different result.

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[975] STORY, *supra* note 89, at 204 (emphasis added).

[976] In local courthouses, federal courthouses, and other places of government administration, intercourse and collusion between the branches of government is an ongoing danger. Lodging the offices of prosecutors (the executive power) and the offices of judges (the judicial power) in the same building, as state and federal courthouses often do, encourages incest between the two, forfeiting impartial courts, due process, and constitutionally required adversity.

For this reason, the design of Washington D.C., symbolically and in reality, removed the headquarters of the executive (the White House) from the legislative and judicial (the Capitol Building) headquarters by a substantial geographic distance. Beginning at the completion of the United States Capitol Building in the year 1800 and until the completion of the Supreme Court Building in 1935, the Supreme Court sat in various locations in the Capitol Building, situated just west of the United States Supreme Court Building. Practical steps necessary to insure circumspect observance of the common-law tradition's separation-of-powers need be taken.

Common-law countries hold the majesty of the law to be sovereign and hold these three powers separate, as branches from the same trunk, independent each from the other and coequal. The civil-law world, by contrast, never sees law as their sovereign, but rather a man or men held in high esteem. Further, these three powers are never held separate and coequal, but rather, in a two-tier hierarchy with the legislative power holding complete control over both the executive and judicial powers.[977]

Our Founders operated in the tradition of the common law: knowing they were unable to foresee every possible violation of the separation-of-powers principle, they included it as a constitutional provision, relying upon the processes of the common law to maintain and apply it. In pursuit of administrative ease, however, American government has confused that which God has directed to be distinct, thereby concentrating the powers and allowing encroachment upon divinely ordained rights. For example, in 1969, the Supreme Court held that judicial decisions concerning the House of Representatives' refusal to seat a congressman do not violate the separation-of-powers principle. In 1977, the Court further held that the appellant's urging of a return to a distinct division of authority between the three branches of government rests upon an "archaic view of the separation of powers as requiring three outright departments of government."[978] Such, however, is arbitrary, without good authority, and destructive of our first principles, which include a fundamental trust of God in place of a fundamental distrust of government.

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[977] An analogy from church history is helpful in understanding the difference between the English common law's view of the three powers of government and the Roman civil law's view. Roman civil law views the three powers of government as Rome views the three persons of the Godhead, that is, in a strict hierarchy and without volition independent of the Father. The Eastern Church, however, sees the three persons of the Godhead—*Θειοτης* (*theiteis*: Godhead) of *Romans* 1:20, instead of *Θεος* (*theos*: God) of *Romans* 1:19—as the common law views the three powers of government: each with independent volition, yet in perfect harmony and obedience to the divine standard.

[978] Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The Federalist No. 47, pp. 325–26 (J. Cooke ed.1961) (emphasis in original). Mr. Justice Story never taught that the separation of powers be violated, but rather, acknowledged the common dependence for authority of the three branches of government, and when, in independent judgment, one branch agrees with another, it has the right to support and enforce the action of the other. In no case, however, does law allow delegation of powers from one branch to another:

> [W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.

In the American common-law tradition, separation of powers refers to each of the three branches of government—judicial, executive, and legislative—fulfilling their separate roles without meddling in the roles of the other two. In the civil-tradition, separation of powers refers to the legislative office's control of the judicial and executive powers. Concentration of will and power in the legislator is the demand of civil law. Common law demands the diffusion of will and separation of executive and judicial power from the legislator's control. All governments will tend toward one or the other, depending upon the religious presuppositions[979] of whichever of the two traditions hold the mind of a country and its government. In 1980, the Supreme Court cited the common-law standard:

> In his Second Treatise of Civil Government, published in 1690, John Locke wrote that "[the] power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands." Two hundred years later, this Court expressly recognized the existence of and the necessity for limits on Congress' ability to delegate its authority to representatives of the Executive Branch: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[980]

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1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow, 5th ed.1905).

[979] The term *presupposition* is used in this book according to the understanding of the common law of evidence: not the acceptance of fact without evidence, but rather, acceptance of fact upon evidence as a beginning point for reasoning; evidence so strong that it need never go to the jury unless refuted. To be valid, therefore, one must base one's presuppositions upon evidence commonly known and strong enough to force indisputable conclusions of fact.

[980] Industrial Union Dept., AFL-CIO v. American Petroleum Institute, et al., 448 U.S. 607, 672–73; 100 S.Ct. 2844; 65 L.Ed. 2d 1010 (1980), *quoting* Field v. Clark, 143 U.S. 649, 692–93 (1892). Then Court rejected this standard with the next sentence: "The rule against delegation of legislative power is not, however, so cardinal a principle . . . ." *Id.* at 673.

§ 3.11.3.1
American Separation of Powers

Our ancestors brought with them the general principles [of the common law], and claimed it as their birthright . . . .[981]

Of all the aspects of common law's separation of powers, the independence of the judiciary is the foremost. In fact, a judiciary independent of the other two powers of government enables the independence of the other two branches. Independence of the judiciary means, in the common-law sense, that neither the other two powers of government, nor any other power, control the findings of the courts. In addition and just as important, it means that the other powers of government are not bound to follow any opinion of the courts it believes is wrong. Our Constitution sets forth the common-law ideal of separation of powers and its foremost requirement, independent courts.

Although Americans have dubbed their highest appellate Court *Supreme*, its supremacy lies not in any power over the other two coequal branches, but instead, lies in its final appellate jurisdiction over other courts and lack of any law requiring that its opinions bow to the will of the executive or legislative powers of the President or Congress. The Constitution limits the Supreme Court to the judicial role.[982] All are to render respect to the Supreme Court's jurisdiction, but absolute supremacy belongs to God alone.

American respect for the Supreme Court and its findings has arisen foremost from the common-law tradition, which regards and defends the independence of the courts. Though Americans hold the Supreme Court in high esteem among our beloved institutions, it is fallacy—which the unscrupulous sometimes manipulate for false gain—to believe that Congress and the President must bow their independent judgment to the opinions of the Supreme Court. In America, this has never been the law, in theory or in practice. Justice Marshall, instead, found the right and duty of the Supreme Court to review real cases and controversies concerning questionable acts of Congress and the President, and to render its opinion upon the constitutionality of such acts.

Justice Marshall was right; in so finding, he confirmed common-law principles of separation of powers: the Supreme and lower courts, hold

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[981] Story, J. *in* Van Nest v. Pacard, 2 Pet. 144 (emphasis added).

[982] The Seventh Amendment further limits the Supreme Court to the rules of the common law: "[N]o fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. CONST. art. 7.

the responsibility of review according to their independent judgment.[983] Nevertheless, it does not follow that the Supreme Court, a coequal branch of government,[984] holds the power to enforce its findings against the executive power. In a word, the Court enjoys no real constitutional mechanism that enables it to press its will against the President or Congress by force.[985]

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[983] *See* Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) (holding that the Supreme Court has jurisdiction to exercise judicial review over the acts of the executive and legislative branches). Having asserted this responsibility, however, Justice Marshall refrained from pressing it, advocating instead, judicial restraint; for at least the next half century, the Supreme Court practiced the judicial restraint set forth in *Marbury*.

The right and responsibility of judicial review, however, was not the salient feature of *Marbury*. By the time the Supreme Court decided *Marbury*, the state courts and lower federal courts had already been exercising their common-law responsibility by making findings respecting the constitutionality and lawfulness (or lack thereof) of legislation. *Marbury* was rather the Court's affirmation of its common-law duty as an independent branch of government to exercise judicial review and self-restraint. Moreover, colonial lawyers, such as James Otis, arguing the Writs of Assistance case in Massachusetts in 1761, relied upon *Dr. Bonham's Case* of 1610, wherein Lord Coke's held that parliamentary statutes contrary to custom and right reason were invalid.

Marbury, therefore, was never a case about judicial supremacy but, rather, stressed that a common-law judge's duty remains as it always has been, to apply the law to the case before him and no other case that the court believes will arise. This responsibility demands that courts have jurisdiction to consider the constitutionality (lawfulness) of legislative acts passed by Congress and executed by the President, each in fulfillment of their independent duty as separate and coequal branches of government, having sprouted from the same trunk of the constitutional tree. *See* Herbert A. Johnson, *Marbury v. Madison*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit Hall ed., 1992).

"When an act of Parliament is against common right or reason," found Chief Justice Coke of the Court of Common Pleas, "or is repugnant, or impossible to be performed, the common law will control it, and judge such an act to be void." Coke's statement takes on more significance, when one considers his insistence—first as a judge and then as a Member of Parliament—that the common law subjects the power of the Crown to the advice and consent of Parliament.

[984] The branches of a tree receive sunlight and sap's nourishment from a common trunk but, are nonetheless, independent of one another. The branches of common-law government, as branches of a tree, stem from a common source of trunk and root; even though government's branches grow out of the common-law tradition, they each must bear fruit independent of one another. If a tree branch attempts the impossible, to draw life and strength from another branch and not from the trunk, it will perish. So also, if any of the three branches of government seeks dependency upon one of the other two branches by attempting to draw from them its authority, that branch will become burdensome dead wood.

On the other hand, if all three branches of government concentrate, in fierce independence, insist upon drawing their authority direct from the common source of the Constitution, as informed by the common law of common right and reason, in light of God's Word, none of the three branches will allow its subjection to any one of the other two. If one branch fails in its obligation to truth, as inevitably will occur from time to time, one of the other two, having remained independent, will rise to its duty to uphold that truth.

[985] See generally § 3.7.12.2 of this book and accompanying notes (providing circumstances surrounding Justice Taney's admission of the futility of the Supreme Court's

Americans, due to their common-law penchant to respect and obey the persuasion of judicial authority, instead of bowing to the threat of executive force, tend to accept the Supreme Court's opinions as though final. Even when Americans disagree with the Court, they have proven patient and willing to allow time and opportunity for lawful processes to correct injustices.[986] It is, therefore, politically dangerous for the President to ignore the Supreme Court's findings. Nonetheless, at times presidents have done so in order to please their political supporters, especially when they have calculated the effect of so doing to be politically beneficial—or even to satisfy their own constitutional convictions.

For example, President Clinton refused to honor the Supreme Court's holding, requiring that employers post notice in all union work places, informing union members that they are without obligation to pay all of their union dues to the union, but instead, are free to give a great percentage of those dues to an agreed-upon charity. In earlier days, during Andrew Jackson and Abraham Lincoln's presidencies, America held a stronger sense of the common-law ideal and constitutional standard that the three branches of government are coequal. Both Andrew Jackson and Abraham Lincoln ignored opinions of the federal courts.[987] Earlier yet, as the *Federalist Papers* reveal, Americans feared the establishment of federal courts because they foresaw that the judges of these courts, being appointed by a president separated from local control, will be vulnerable to the President's civil-law-like control—a healthy fear of a real presidential temptation. Sure enough, President F.D. Roosevelt, determined to control the entire judiciary by usurping power over the Supreme Court;[988] but fearing public disdain, he dropped the scheme.

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marshals in command of the posse comitatus, challenging President Lincoln in command of the armed forces of the United States).

[986] Increasing the use of the Jury by making it available at the demand of the aggrieved in all matters brought before our courts, whether criminal or civil, will preserve our common-law tendency to respect the eternal majesty of the law. Use of the Jury recognizes the divine imprint placed upon every individual made in the image of God that allows individual discovery of the truth.

[987] Both Presidents Jackson and Lincoln, in specific instances, ignored federal court findings; whether for right or wrong, historians disagree. See generally *id.*, for President Lincoln's ignoring of the federal judiciary.

[988] In 1937, President F.D. Roosevelt tried to swell the number of justices from nine to fifteen in order to obtain the Court's majority agreement for his multiplications of executive power. History remembers his attempt to get control of the Supreme Court, as the court-packing plan.

The Constitution requires that each office-holder in all three branches of government—*e.g.*, judges, representatives, senators, and presidents—swear upon his oath that he will support the Constitution.[989] Moreover, his oath of loyalty must be to the Constitution and never to the Supreme Court or its findings. Traditionally, this oath, regardless of who swears it, follows alike the oath the Constitution sets forth for the office of President, which requires an independent duty to defend the Constitution against all enemies, foreign and domestic.[990] Such independent duty is meant, if need be, to pit the oath taker against those in government that make themselves enemies of constitutional principles, i.e., those of common-law separation of powers.

For example, the office of the President (executive branch) arises from the Constitution as coequal with the Supreme Court (judicial branch). If, therefore, the President is convinced—in his independent and well-pondered judgment—that the Supreme Court has erred, he is oath-bound and honor-bound to follow his convictions in loyalty to the Constitution by lawful means, with the resources within his lawful reach. The same is true concerning the independent judgment of each member of the federal judiciary: duty requires each judge to protect the Constitution when, in good faith, he concludes that the President threatens its principles.

In light of the individual office holder's and judge's independent duty of loyalty to the Constitution, no other conclusion is reasonable. Some object, saying that the President's ability to enforce his will is—by a dangersome-sight more—greater than the federal courts' and Congress' ability to enforce either of their. Nevertheless, history shows that the Jury's power of the verdict and the judiciary's power of the pen in persuasion of ideals is, at the least, a worthy match. Indeed, men govern with *words*. Moreover, influence of those who govern with force alone never lasts beyond their ability to use that force, but the sway of those who govern by written words outlasts those who write them.

At the outset of the twentieth century, Charles Beard persuaded many that the Supreme Court's opinions, even when unconstitutional, trump the executive (President) and the legislative powers (Congress), binding

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[989] *See* U.S. CONST. art. VI, cl. 3.

[990] The Constitution requires that the President elect, before acting in the capacity of his office, swear the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and I will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, § 1, cl. 8 (capital letters in original). Regardless of whether one characterizes this vow of loyalty as an oath or as an affirmation, in light of Scripture it remains an oath because it expresses a voluntary undertaking before one's countrymen: a loyalty of trust taken in solemnity to lawfully exercise discretion in wielding government power.

these powers to obedience. Beard, however—as have many others before and after—, refused to tell apart the Supreme Court's authority to pass upon the constitutionality of legislation and the Supreme Court's power over legislation. Put another way, Beard tried to equate the Court's common-law responsibility of judicial review over legislation with judicial control of the legislature. Beard's devise used to achieve his desired result, though clever, was deceitful. Beginning with the right controlling question for discussion and resolution, having an obvious answer, he slowly transformed it, step by step over the course of his discussion, until fashioned in a way that gives the unconstitutional answer. Beard, however, continuing to insist upon the first answer. He changed the question, but kept the answer; thus, the unwary agreed with him.[991]

Beard was a Quaker and, thus, a bit of a mystic and committed to the trustworthiness of humanity. Above all, he was an ardent socialist.[992] Given the state of politics in America, Breard believed that the easiest way to transform America into a socialist state was to obtain a Supreme

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[991] During the early decades of the twentieth century, the writings of Charles Austin Beard (1874–1948) further persuaded the unwary that the Supreme Court is above the other two branches of government. Beard begins by presenting the right question, using right terms: "Did the Framers of the Constitution intend that the Supreme Court should pass upon the constitutionality of acts of Congress?" The undeniable answer is yes. He then, in the next sentence, replaced the phrase "pass upon the constitutionality of acts of Congress," with "nullification of statutes by the federal judiciary." Then in the course of his discussion, two sentences later, he replaced the phrase "nullification of statutes by the federal judiciary," with "judicial control over legislation." CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION 37 (1962) (1912). By confusing the terms *pass upon*, *nullification*, and *judicial control*, any reader accepting Beard's view of the Court's power to judge the constitutionality of legislation also accepted Beard's notion that the Court has power over legislation. Even the Supreme Court has cited Bread's book on this point as authoritative.

By these substitutions, Beard transmutes (in the minds of unwary readers), in two steps, constitutional truth into unconstitutional doctrine. By slight of pen, the right question, "Did the Framers of the Constitution intend that the Supreme Court should pass upon the constitutionality of acts of Congress?" became, *Did the Framers of the Constitution intend the judicial control of legislation*? The constitutional answer to first question is "yes." Beard, however, having transformed that controlling question so that the constitutional answer is "no," still maintained that the answer is *yes*.

[992] Beard was a Quaker and an ardent socialist and as such, was utopian in outlook, committed to breaking from America's past, and best known for his theory that America's Founders and the Constitution's Framers were motivated foremost by personal greed. Beard's book, *An Economic Interpretation of the Constitution of the United States* (1913), made him a well-known academic figure and comported with present theories of law and economics espoused by men such as Richard Posner. Beard taught at Columbia University until 1917. After World War I, Beard remained politically active, but was unable to secure an academic appointment because of his socialist convictions. *See generally id.* (claiming that the Framers intended the Supreme Court to enjoy the final word on the constitutionality of congressional legislation).

Court of intellectual elites, instead of practicing lawyers, thereby gaining federal judicial control over legislation and all courts.[993]

Those opposing Beard's view, though unlike Beard, being forthright in their position, nonetheless also erred, reacting too far in the opposite direction, saying that Congress (the national legislature) must control the federal judiciary. The constitutional view, however, mirrors the common-law tradition: because the Supreme Court is a coequal power with Congress, it is responsible to pass upon the constitutionality of acts of Congress, but is without power over Congress; likewise, Congress is without control of the Supreme Court. Indeed, the Constitution follows the common-law tradition, holding the three powers of government in perpetual tension—as also does Scripture.

As thus expounded by Justices Marshall and Story, the Supreme Court—as a coequal branch of government—holds common-law authority of judicial review over the acts of Congress and, by extension, the President.[994] Because the Constitution never explicitly address the matter beyond creating the Supreme Court as a coequal power, one must consult the common-law tradition to know the right practical relationship between the powers of government. Moreover, judicial review is not a responsibility exclusive to the Supreme Court. The common law requires each judge, office holder, and officer in each branch of the federal and State governments to bind himself by oath to exercise independent judgment concerning what is constitutional and what is not, and to act accord with the sincere conviction of his conscience, in support of the Constitution.[995] If one disagrees with the Supreme Court's judgment on a constitutional matter, the Constitution provides lawful channels of response and resistance.

Because each officer and official in each of the three branches of government is responsible to act lawfully in support and defense of the Constitution, the law forbids any judge or officer from using Supreme Court rulings as cover for lawless acts. For example, when the courts of England and the United States declared Africans to be less than men, any act or failure to act by any in the legislative and executive branches that brooked the judicial branch's rulings or otherwise allowed free reign to the slave traders, violated his oath and breeched his duty. No court has

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[993] In the common-law tradition, even the legislature (Congress) has power over legislation, only so far as it controls legislative language. Congress must depend upon the President to enforce the terms of its legislation.

[994] The common law's doctrine that the courts have authority to pass on the lawfulness of the other two branches of government is consonant with *Deuteronomy* 17:8–13 and 21:5.

[995] *See* U.S. CONST. art. VI, cl. 3.

authority to transform those things that are unlawful, into that which is lawful. The courts' errant rulings, therefore, never relieved any congressman's duty or even the slavers' responsibility for their unlawful acts.[996]

Those that lay charge against the Supreme Court, or any other common-law court, for making law instead of interpreting law partially misplace their charge; Supreme Court justices and other appellate judges have not authority from God or even the color of authority from the Constitution to make law. On the other hand, the Constitution's common-law principles, and the Judicial Power Clause in particular,[997] bestow upon the federal courts the responsibility to articulate the Constitution's application in specific cases. In articulating their opinions, the Court's justices and other judges fulfill their duty under the Constitution. To meet this responsibility is not to make law; it is to provide opinions as to what they believe the law is. However correct or erroneous their opinions are, they remain just that: opinions. If these opinions are wrong and the President and Congress choose to enforce and fund such error, they are also at fault. The opinions of the Supreme Court and other judicial opinions that are erroneous can never transform into constitutionality that which is unconstitutional. Further, at common law, court opinions are not law but, instead, are reputable evidence of what the court believes the law is.

Because men at their best are still men, at best; and because any one man's, or group of men's, reason is foregone to error at some point; the Constitution lays the responsibility of independent judgment concerning what is constitutional and what is not upon every office holder; not just the courts and judges. If, for example, in the President's well-pondered and sincerely held conviction, the Supreme Court is wrong on any given point, and he chooses to enforce the Court's error; he has violated his oath and is also responsible for that error. Further, if a congressman, understanding that a given Supreme Court opinion is unconstitutional, continues to perpetrate the Supreme Court's error by voting to fund the unconstitutional activities those opinions demand, he is also responsible and has acted in violation of his oath.

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[996] Lord Mansfield's prejudgment remarks to *Somersett* stated that no precedent is found in the common law for slavery on English soil, regardless of whether Somersett was "a slave according to American law . . . We cannot at any of these points direct the law; the law must rule us . . . ." Lord Mansfield then found: "The state of slavery . . . is so odious, that nothing can be suffered to support it, but positive law."

[997] "The judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (lower and upper cases in original).

Neither the President nor any congressman is at liberty to ignore this responsibility; their duty of independent judgment is non-delegable by the common law's standard and by their oath. Just as it is never the Supreme Court's fawning duty to uphold unlawful acts of the President or Congress, never is it the President's unconditional duty to enforce clearly unlawful rulings of the Supreme Court. Likewise, never is it a congressman's duty to support legislation, the President's demands, or the Court's opinions, if he believes these are unlawful. In short, it is never anyone's right or duty to do wrong. Thus is the undeniable law of nature, common law, and Scripture. By this standard, freedom depends upon each person insisting upon the adversarial tradition of our common-law government at every level. Most important, it is the independent duty of each person called to sit on the Jury to decide how the law applies to the party before the court, if at all.

Upholding freedom, then, is every American's trust. Indispensable to this tradition are office holders and jurors of independent judgment and action. The common law, therefore, holds every American legislator and executive to the same standard of independent judgment as the courts. The oath which binds every president, governor, legislator, and judge of the United States and of the several States to support the Constitution by exercising independent judgment concerning what is lawful and what is unlawful,[998] never binds them to anything in addition to our common-law tradition as expressed in our Constitution, but instead, additionally binds them to that which it is already their duty to do: preserve, protect, and defend the Constitution against all enemies, foreign and domestic.

§ 3.11.3.2
The Jury's Final Say

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law.*[999]

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[998] *See* U.S. CONST. art. VI, cl. 3.

[999] U.S. CONST. Amend. VII. (capitals in original). *See also* The Northwest Ordinance:

> The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings *according to the course of the common law*. All persons shall be bailable . . . All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the

Who then, among the limited governments of men, has the supreme say of what is lawful and what is not? England claims such final say for Parliament, but in practice, her courts retain the power of judicial review of the constitutionality of Parliament's acts. Moreover, where the plaintiff or defendant concludes matters upon the country by jury trial, the findings of the common-law Jury are final.

Truth is fact, whether of deed or of law. The Constitution never finds the final human arbiter of truth among the branches of her government because these three are coequal. One finds it, instead, in the gathered Jury verdicts in individual cases. That the findings of the Jury trump all three branches has been the tradition of the common law since its early days among the Anglo-Saxon moots. The decision of the common-law Jury—empanelled as a sampling of the party's neighbors, drawn by lot, and sitting as a court of judges between potential State action and the defendant[1000]—stands above all three branches of government concerning the case the Jury must to decide.

The Jury are masters of the facts and masters of the law in two respects: the Jury applies the law to the facts; the Jury can disregard the law. "If the jury feels that the law . . . is unjust or that exigent circumstances justified the actions of the accused . . . the jury has the power to acquit, and the courts must abide by that decision."[1001] Further, "[t]he pages of history shine with instances of the jury's exercise of its prerogative to disregard . . . instructions of the judge."[1002] The common-law principle of supremacy of the Jury over the rest of government in particular cases, governs in the jurisdictions of the several American States[1003] as well as in the federal courts. The authority and power of the

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> land; . . . And . . . no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed.

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO, art. II (1787) (emphasis added).

[1000] *See* Blakely v. Washington, 542 U.S. 296 (S. Ct. 2004).

[1001] United States v. Moylan, 417 F.2d. 1002, 1004 (D.C. Cir. 1972).

[1002] United States v. Dougherty, 473 F.2d 113, 136–37.

[1003] *See generally* COOLEY, *supra* note 61 (examining the ideals of the common-law governments of the several states in light of their state constitutions). For decades, Louisiana, a civil-law jurisdiction, had followed her state Constitution's , granting jury trials only in cases allowing capital punishment or imprisonment at hard labor. The Louisiana Supreme Court upheld these provisions as lawful.

In 1968, however, the United States Supreme Court expanded the common-law right to trial by jury in Louisiana to include any criminal case which, if tried in federal court, demands a jury trial under the Sixth Amendment:

juror is to either allow or forbid government enforcement against the defendant; never a power to condone lawlessness, but a power to bar the lawlessness of government and other powerful parties in particular cases.

In reliance upon the ultimacy of the common-law Jury as the country's court of conscience, the Constitution's Framers established the judicial, executive, and legislative branches as coequal; each fully responsible to exercise independent judgment concerning what is constitutional and what is not. Moreover, as *coequal* branches, their duty of independent judgment is non-delegable: each member of each branch is one hundred percent responsible for his determination of what is lawful and what is not. Both the common law and the Constitution forbid the President or any member of Congress from abdicating to the Supreme Court their individual duty to interpret the Constitution. Moreover, common-law jurors—having authority and power to judge the facts as well as the application of the law—are the common-law tradition's final earthly arbiters of the individual's rights.

§ 3.11.4
American Law:
More English Than England's

[E]ven in the free government of Great Britain, an act of parliament, combining, as it does, the will of the crown, and the legislature, is absolute and omnipotent.[1004]

The Constitution's demand of coequal standing of the judicial, executive, and legislative powers set the United States in early pursuit of the

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1. Since trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases [in state courts] which, were they tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury.

2. The penalty authorized for a particular crime is of major relevance in determining whether it is a serious one subject to the mandates of the Sixth Amendment, and it is sufficient here, without defining the boundary between petty offenses and serious crimes, to hold that a crime punishable by two years in prison is a serious crime and that appellant was entitled to a jury trial.

Duncan v. Louisiana, 391 U.S. 145, 147–48, 159–62 (1968).

[1004] STORY, *supra* note 89, at 594.

common-law ideal from which England detoured in 1688, with Parliament's assumption of the Crown and its sovereignty:

> [T]he widest departure of American law from English law is in the constitutional law. But *in this departure Americans have been thoroughly English*. We have continued and developed the doctrine of the English common law from the middle ages to the seventeenth century, where England, having in 1688 substituted parliamentary absolutism for the Royal absolutism claimed by the Stuarts, departed from the doctrine of the common law lawyers.[1005]

Though both the United States and England are common-law countries, holding to the majesty of law and the separation of powers, in form, the two differ. In the United States, the judicial, executive, and legislative branches each stem direct from the same fundamental law, our written Constitution; England, however, claims these three powers stem direct from her Parliament, which not only legislates, but also exercises some judicial and executive powers as well.

For example, Parliament's Upper House of Lords exercises appellate judicial power and the leading Member of Parliament's Lower House of Commons (the Prime Minister) exercises the executive power. In addition, because Parliament's Lower House of Commons is under direct democratic sway, it alone must introduce any tax legislation. Thus, because England claims its three branches of government now stem from Parliament, she deems them independent branches of the sovereign legislature, balanced in power:

> [Y]et admiralably tempered and compounded, [so] that nothing can endanger or hurt it, but [except] destroying the *equilibrium of power between one branch of the legislature and the rest*. For if it ever should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, their would soon be an end to our constitution.[1006]

[1005] Roscoe Pound, *The Development of American Law and its Deviation from the English Law*, 40 L.Q. REV. 67 (1951) (emphasis added).

[1006] 1 BLACKSTONE, *supra* note 12, at 51–52 (emphasis added).

Because the national legislature, Parliament, claims sovereignty, some assume that the judicial and executive powers of England bow to the legislative will. Each of the three branches of Parliament, however, exercises its power as an independent coequal.

Because the American Colonists suffered the results of the mother country's confusion of the executive power (the Crown) with the legislative power (Parliament), separation of government powers was key in their struggle for common-law ideals. Locke's *Second Treatise of Government* affirmed the Colonials' zeal: practical liberty requires independent branches of government.[1007] Americans demanded that their national and State governments hold their powers separate and independent; James Madison acknowledged its importance;[1008] the constitutions of early State governments, such as Massachusetts, referred to it explicitly.

In theory, the direct source of Parliament's sovereignty is the Crown; however, Parliament alone claims authority for the exercise of that sovereignty.[1009] Thus in England, national legislative supremacy is the rule *de jure*. In practice, however, Parliament stays within unwritten constitutional boundaries and common-law limits. Still, in the limited sense of governments among nations, Parliament is sovereign in England, and, according to Blackstone, acknowledges no equal *on earth*. Americans, on the other hand, acknowledge the coexistence of two distinct sovereigns on earth: the United States and each separate State of the United States. Further, unlike Parliament, neither Congress nor any State legislature claims any legislative supremacy, in law or by practice.

Yet, some Americans live under sway of either of two false notions: that the acts of Congress are supreme or that the findings of the Supreme Court are supreme. Both notions are wrong as a matter of common law and constitutional design. Unlike the English, Americans have never saddled themselves with an official theory of legislative supremacy, or even judicial supremacy, but rather, operate in the traditional common-law understanding: only the Godhead is sovereign and, therefore, divine supremacy limits and common-law adversarial ideals curb American government.[1010] Moreover, the common law, through constitutional

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[1007] See Field v. Clark, 143 U.S. 649, 692–93 (1892).

[1008] *See* THE FEDERALIST No. 47 (James Madison).

[1009] The Crown (the official executive) is a part of Parliament.

[1010] *See* U.S. CONST. art. I, § 8. The common-law limits the powers of government; further, within these limits, American constitutional law allots authority between the federal and state governments under the principle of *federalism*. Traditionally, within a state's boundaries and within the common law's limits, the jurisdiction of a state's government is full. The federal government, however, is a government of limited

design, disallows incestuous fusion of the branches of American government: insisting that each branch, though stemming from the same Constitution, reach for the sunlight of truth on its own, independent from the other two branches.

Though England guards the independence of her courts—the most crucial aspect of the common law's separation-of-powers[1011] requirement—from the executive and legislative powers, still England allows an overlapping of the judicial, executive, and legislative powers, which the United States Constitution and the several State constitutions forbid. For example, not only does Parliament's House of Lords have appellate jurisdiction over the courts in certain cases, the British Crown has appellate jurisdiction over the findings of certain courts of former British Colonies. As a practical matter, however, the Queen's Privy Council handles judicial review of such appeals from Commonwealth courts, much as the President's administrative bureaucracies operate his administrative (executive) courts. The Queen, somewhat like the American President, stays detached, separate, and aloof; unlike the President, she rubber-stamps the opinions of her Privy Council. The President, having already delegated his power to the bureaucrats, need not rubber-stamp their decisions.

In addition, the executive power of the Crown, being a part of Parliament, is said to flow into and through Parliament, resting, by Parliament's consent, upon its leading member the Prime Minister. Such arrangements of England's government have lead civil lawyers to conclude that her common law and government—mush as the English system of measurement—lacks predictability and precision, and is even illogical and untidy.[1012] As a matter of fact, the accusation is right; unlike

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jurisdiction, according to the limits the Constitution set forth. *See generally* COOLEY, *supra* note 61 (providing a thorough analysis of the powers of the states under the common law's doctrine of *police power*). Cooley analyses the relationship between the powers entrusted to the federal government and the police power of the several states within the context of the common-law tradition.

[1011] When discussing *separation of powers* in the context of comparative law, one must distinguish between the common-law's meaning of the phrase and the civil-law's meaning. Comparative-law writers sometimes fail to make this distinction, swelling confusion. To a common lawyer, separation of powers means separation of the powers, each from the other, of the three offices of government: judicial, executive, and legislative. To the civil lawyer, separation of powers means that the legislator or the legislature has separated the judicial power from the courts to the single will of a legislator or legislature. See generally infra this § 3.11.4 (further discussing the difference between the common law's and the civil law's understanding of *separation of powers*).

[1012] Common-law government, however—like as a common-law trial—, is never about the prerogatives of government precision and ease of governing, but is all about protecting and respecting individual rights and relationships. Understood aright, common-law

the civil law, common-law government does not seek to control the outcome in predictability and precision, but rather, being adversarial, it seeks due process and fair play, all under the belief that only through these can the truth win out.

At bottom, the foregoing overlapping-of-powers result from Parliament's assumption of the powers of the Crown, including its political sovereignty, following Parliament's defeat of the royalists in the seventeenth century. The United States' stricter separations of power, however, render the Americans common-law government more thoroughly English than are the English: England's seventeenth-century Parliament thrashed royal absolutism, but England's eighteenth-century American Colonies carried on the struggle, routing legislative absolutism.

Since 1688, the English have claimed Parliament to be her absolute sovereign, but to their honor, have never practiced legislative absolutism. Though Parliament—never the Crown—exercises political sovereignty in England, the English courts', as do the American courts, claim the right of judicial review of Parliament's acts.[1013] Parliament has yet to complain.[1014] In constitutional theory then, Parliament is absolute; in

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government is for the sake of individuals and their relationships; civil-law government is for the sake of the governors.

[1013] The North America Act of the British Parliament of 1867 recognized the authority of the Supreme Court of Canada to pass on the constitutionality of the acts of the Dominion Parliament and upon the acts of the legislative bodies of the separate provinces. Likewise, the Australian Constitution of 1900—which follows close our Constitution—recognized the authority of the High Court to decide, upon a party before the Court raising the question, whether the law of the Commonwealth or the act of an Australian state conforms to their Constitution. *See* THOMAS JAMES NORTON, UNDERMINING THE CONSTITUTION: A HISTORY OF LAWLESS GOVERNMENT 18 (1950).

[1014] Thomas Cooley discusses the self-defeating, *unconstitutional law*—a phrase persisting to the present day—, then addresses England's departure from common-law standards of government by their attribution of English sovereignty to Parliament:

> Indeed, the term *unconstitutional law*, in American jurisprudence, is a misnomer and implies a contradiction; that [a legislative] enactment which is opposed to the Constitution being in fact no law at all. But where, by the theory of government, the complete sovereignty is vested in the same individual or body which enacts the ordinary laws, any law, being an exercise of power by the sovereign authority, could not be void, but, if it conflicted with any constitutional principle, it must have the effect to change or abrogate such principle, instead of being nullified by it. This must be so in Great Britain, with every law not in harmony with preexisting constitutional principles; since, by the theory of its government, Parliament is sovereign, and may change the situation at any time, as in many instances it has done, *by declaring its will* to that effect.

practice, however, Parliament respects the findings of the English courts' review of legislation for constitutionality, i.e., lawfulness. For example, in 1972, the House of Lords—in spite of Parliament's passing of the Sexual Offences Act of 1967 legalizing homosexual acts in private—asserted the independence of the judiciary respecting standards of decency *contra bonus mores*,[1015] holding the courts bound by stare decisis to follow their former decisions and to disregard Parliament's legislation.[1016]

England's seeming attribution of absolute sovereignty to Parliament implies that that English courts must do as the civil-law tribunals do: rule in strict compliance with the legislative power holder's statutory command. "What Parliament doth," it is said, "no authority on earth can undo." Further, said Sir Matthew Hale, Parliament is "the highest and greatest court, over which none other can have jurisdiction in the kingdom . . . ." Despite such strong language of absolute legislative and judicial power in Parliament, in practice, the common-law tradition has softened the outcome. Further, language such as Hale's "is certainly inapplicable to any authority in the American States . . . ."[1017] Because England says Parliament holds legislative supremacy, reason demands that the courts bow to Parliament's will. England's common law, however, remains founded not on any theory lying wholly within the

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COOLEY, *supra* note 61, at 3–4, *citing* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 159–60 (1769) (emphasis added). *See also* ALEX DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. 6 (1835).

In 1688, England's Parliament enacted a coronation oath, to reveal its then recent assumption of national sovereignty. Before that time, the coronation oath had always been, in substance and sense, the same oath of the Anglo-Saxon Kings, requiring the English Crown to observe well the laws, customs, and liberties of King Edward the Confessor (the common law). From William I until 1688, all those receiving the Crown took the Anglo-Saxon's coronation oath to uphold the common law—understood to be the ancient Anglo-Saxon customs embodied in the Laws of King Alfred, repeated in the Laws of Edward the Confessor, and articulated in Magna Carta—as the law of the land, legislation of Parliament to the contrary notwithstanding.

Since 1688, however, British kings and queens have sworn "to govern . . . according to statutes in Parliament . . . and the laws and customs of the same." Cooley concludes aright: in theory, Parliament is sovereign in England. In practice, however, England remains inconsistent: Parliament respects the findings of English courts that hold its acts unconstitutional. Common-law has ingrained its first principles deep.

[1015] *Contra bonus mores*: Latin, "against good morals." The common-law courts have interpreted this phrase to embrace those things offending both one's conscience and one's sense of justice. Therefore, legislative acts that encourage immorality and contracts for immoral purposes are voidable by the courts. "Whatever is *contra bonos mores et decorum*, the principles of our law prohibit, and the King's court . . . is bound to restrain . . . ." Jones v. Randall, 98 E.R. 706–07 (1774) (per Mansfield, C.J.).

[1016] *See* Knuller (Publishing, Printing & Promotions) Ltd. & Others v. Director of Public Prosecutions [1972] 3 W.L.R. 143.

[1017] COOLEY, *supra* note 61, at 86.

bourn of logic,[1018] but on the strength of reality: fact and conscience. English courts, in holding that acts of Parliament in violation of the English Constitution are never binding, reveal that the common law remains unwilling to entrust the legislators with absolute power.

Because it is not the way of the common law that legislators control the courts (the Jury and judges), the common law never—as does the civil law—confines its judge to a mere clerk's role: cogs in the legislative machine; mechanical enforcers of the legislative will. In deciding cases and applying the law, common-law courts are free from following the statutory will of the state without reviewing such legislation and state actions for lawfulness,[1019] under two standards: constitutionality and precedent or stare decisis. In a civil-law system, however, for a judge to question the lawfulness of the legislative will is to risk his job. For a judge in a common-law country to question the lawfulness of the legislative will is to do his job.

Even though England's separation between Parliament and the executive is less strict than it is in the United States, the English remain scrupulous about barring members of Parliament from keeping their legislative seats after accepting certain Crown (executive) appointments. Because statutory law bars any Member of Parliament from resigning his seat, the only means of escape, short of dying, is a Crown appointment. If a Member of Parliament accepts the Crown's offer of an appointment, the common law's separation-of-powers enables him to escape his seat in Parliament. If he wants to go further, however, and make a clean break from all government service, he must begin the process by securing a Crown appointment to the ancient office called *Steward of Chiltern Hundreds*.

In ancient days, the Crown appointed a royal officer to each *hundred* (forerunner to the American township), charging him with protection of children and other local folk from outlaws and thieves that often hid in the hundred's wooded lands. The Crown called this office "Steward of Chiltern [archaic spelling of *children*] Hundreds." Though now only a sinecure, the common law's separation-of-powers principle bars a Member of Parliament from holding his seat in Parliament, while serving as the Crown's *Steward of Chiltern Hundreds*. Since, however, English law prohibits Members of Parliament from resigning their seats, his escape must be by operation of law: he simply secures an appointment

[1018] As the reader will recall, the common-law tradition is not based on logic and driven by speculative theory, but is founded on facts and is driven by facts.

[1019] *See* MERRYMAN, *supra* note 82, at 34–38, 87–88.

from the Crown as a Steward of Chiltern Hundreds; whereupon, the common law's separation-of-powers doctrine, by its operation, removes him from Parliament. He then resigns from the office of Steward and his escape from government service is complete.

Chapter Four

Common Law & Scripture

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§ 4.1
Common Law & Scripture

There has never been a period in which the common law did not recognize Christianity as lying at its foundations.[1020]

Christianity has been the enlivening principle of our common-law tradition. Even if one ignores the biblical warrant ingrained in the common law's foundations, the habits resulting from these bring benefit. Others beside Justice Joseph Story have held steadfast that Christianity is the heart of the common law, supplying its authority and limiting government power:

> Christianity is a part of the common law from which it seeks its sanction of its rights and by which it endeavors to regulate its doctrine. And, notwithstanding the specious objection of one of our distinguished statesman, the boast is as true as it is beautiful. There has never been a period in which the common law did not recognize Christianity as lying at its foundations. For many ages it was almost exclusively administered by those who held its ecclesiastical dignities. It now repudiates every act done in violation of its duties of perfect obligation. It pronounces illegal every contract offensive to its morals. It recognizes with profound humility its holydays and its festivals, and obeys them as *dies non juridici* [a day not juridical: exempting holidays and Sundays from court proceedings]. It still attaches to persons believing in its Divine authority the highest degree of competency as witnesses.[1021]

Courts in the United States have also held that the common law draws its life from Christianity.[1022] From the Saxon kings to Sir John Fortescue, on through to Sir William Blackstone and into modern times, the history of

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[1020] Joseph Story, *Discourse Pronounced upon the Inauguration of the Author as Dane Professor of Law at Harvard University, 25 Aug. 1829*, *quoted in* THE LEGAL MIND IN AMERICA 176, 178 (Perry Miller ed., 1962) (emphasis added). See, *e.g.*, LEVY, *supra* note 712, for indirect, but nonetheless powerful, examples of this truth. Upon the Anglo-Saxons reception of the Scriptures, their folk law became known as the common law.

[1021] BENJAMIN F. MORRIS, THE CHRISTIAN LIFE AND CHARACTER OF THE CIVIL INSTITUTIONS OF THE UNITED STATES 802 (2007) (1854).

[1022] *See*, *e.g.*, Strauss v. Strauss, 148 Fla. 23.

the common law gives steady evidence of its accord with Scripture.[1023] Though from time out of memory courts have observed that Christianity lies at the foundation of the common-law tradition, not until the eighteenth century, in response to rationalism from the continent, did common lawyers articulate Christianity's relationship to the common law. It is "[o]ne of the basic principles of the common law . . ." says Heward, "that a man should not injure his neighbor and it is in this sense that the 18th century lawyers regard Christianity as part of the common law . . . ."[1024] Thus, for example, a government that never offers relief "from a slavery of mind and body," by ending the debt of the unfortunate debtor trapped for life, says Justice Story, "is incompatible with the first precepts of Christianity; and is a living reproach to the nations of Christendom [sic], carrying them back to the worst ages of paganism."[1025]

Standards of human morality found in Scripture and those of heathen religions are at times alike—albeit for different reasons—, such as forbidding to lie, steal, and murder. Nevertheless, fundamental differences between Scripture and all other religions inflame hatred and hostility toward Christianity.[1026] In the same way, history and present

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[1023] The common law's strength, during its years of transition from youth into manhood, was that the Word of God dwelt in its forms. One can hardly read a page of Sir John Fortescue without seeing direct reference to the Bible and inference from it, including exposition and application of Scripture's precepts. To Fortescue, the common-law ideals were the practical outworking of Scripture. For example, in describing the duties of the English judges, Fortescue says, "[T]he justices . . . pass the whole rest of the day in studying the laws . . . [and] reading Holy Scripture . . . ." Concerning princes he exhorts, "Every prince ought to have knowledge of the Holy Scriptures." Citing 2 *Chronicles* 19:5–6, Fortescue sums up the source of common-law judgments: common-law judgments are *derived* wisdom. Exhorting judges, he writes, "The judgments that you give are the judgments of God." Fortescue persistently justifies the common law's principles by reference to the Bible. FORTESCUE, *supra* note 59, at 129, 137. Without the Word of God, common law is a deflated form; and without the common law, American culture as we know it will cease.

[1024] HEWARD, *supra* note 386, at 178. *See also* SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, pt. IV, 71 (London 1641)

[1025] STORY, *supra* note 89, at 386. Justice Story writes these words in support of the Constitution's bankruptcy provisions.

[1026] Following his examination of the Gospel records in the light of the common law of evidence, Simon Greenleaf concludes:

> The religion of Jesus Christ aims at nothing less than the utter overthrow of all other systems of religion in the world; denouncing them as inadequate to the wants of man, *false in their foundations*, and dangerous in their tendency.

SIMON GREENLEAF, THE TESTIMONY OF THE EVANGELISTS 7–8 (photo. reprint 1982) (1874) (emphasis added). See generally app. 20 of this book (discussing the latent power available to the Christian).

experience demonstrate that civil-lawyers react with arrogant hostility toward common-law ideals of law and government, such as freedom of conscience, association, and use of the Jury.

Common-law countries, however, have proven better able—by far and away—to withstand the storms of political strife and threat of revolutionary upheaval attending transfers of government power than have civil-law nations. Where the common-law is ingrained, stability results; Christianity ingrains the ideals of the common law into the mind and conscience. The gravity[1027] of the Church's presence and the fearless daring that arises from respect for God's Word written strengthens the common-law, displacing notions of civil law.[1028] What the individual Christian desires and does is the direct result of what he is. The true Christian's hunger for the Scriptures, therefore, results from his being, which, in turn, determines the law and government he demands. In short, because the common-law tradition is consonant with Scripture, the true Church has affinity for its principles.[1029]

God is the Author of history and origins. He has made mankind (Adam) in His image; therefore, people in general—Christian and pagan[1030]—by nature, tend toward right forms and processes of government. Moreover, the Creator has stamped this character into all mankind,[1031] impressing it into each individual's consciousness—much as the mint strikes an image upon individual coins. It is thus unsurprising

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[1027] God's glory (כבד, *cavodth: weightiness*) is the gravity of His presence. Found in the one God has justified, *cavodth* produces divine agitation to change for the better.

[1028] Because God the Holy Spirit indwells the Christian, God's presence goes where the Christian goes, enabling—even impelling—intrepid behavior.

[1029] *See generally Matthew* 5:13–14 (emphasizing the effect of the essence of God's people as contrasted with their contrived efforts).

[1030] The writer does not use *pagan* in a pejorative sense, but rather, to denote worshippers of creation or some part of it, as distinguished from worshippers of the personal Creator. "Pagan" became synonymous with *heathen* when Ulfilas used the old English *heath* (now "heathen," meaning originally heath dweller: one living in the open fields where the *heather* flowers grow) to translate the Latin *pagus* (English "pagan": a non-city dweller; one living, in the country, unrefined, and ignorant). Ancient writers used both "pagan" and "heathen" in the Christian context to signify those who had not yet heard the gospel because of their geographic remoteness. In time, however, the two terms further distinguished themselves: "pagan" signifying a worshipper of nature, ancient from the speaker's or writer's perspective; "heathen" signifying a worshipper of nature contemporaneous with the speaker or writer. For example, the ancient Greeks we call pagan; the present Moslems we call heathen.

[1031] This innate capability to recognize principles of good government, men popularly called *natural law*. It arises from every person's natural potential to discern right from wrong, having received it by nature from the Creator. See generally § 5.1.2 of this book (discussing *Romans* 2:14–15 and natural law as the innate ability to discover and learn the law, not the innate possession of the law).

that when an individual's life, liberty, or property is in jeopardy, he will readily discern, anxiously claim, and put to practice common-law protections. However, when the life, liberty, or property of another is in jeopardy, though outraged, he will be less likely to act.[1032]

For example, England's preeminent humanist Thomas More followed Thomas Aquinas, requiring that inquisitors, when interrogating those suspected of heresy (disagreement with the Roman pope or priesthood), force the accused, by whatever means necessary, to swear an oath to answer truthfully any and all questions asked, thus forfeiting his right to remain silent.[1033] In addition, More held that when such a suspect answered truthfully, but in disagreement with Roman doctrine, the state must execute him for heresy. When the shoe, however, was on the other foot and the tribunal commanded Thomas More to take the same oath, he claimed the common-law's protection of his conscience and his right to remain silent. Moore refused the oath.[1034]

Though each person is able to see and ponder good ideas and even to initiate, institute, and practice such ideas for his own benefit, without the Spirit of Christ, rulers are unable to maintain ongoing respect, year upon year, for the rights of others.[1035] Groups—such as, for example the early

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[1032] Some will say that if the individual will be at times outraged and willing to state his opinion, but often—unless his mind is captive to Scripture—remains unmoved to action respecting the rights of another, the Jury are no better than the inquisitor. To so hold, however, ignores the reason for the Jury seating twelve persons as a local sampling of the country: twelve persons, drawn at random, gives good opportunity that one or more will be captive to the truth and willing to act to protect his neighbors rights. Besides, inquisitors are minions, sworn to an imperial state, acting upon imperial command, and subject to punishment for disobedience; whereas the juror swears his oath to the law and no other, binding himself to act against his neighbor only if he has a common fellowship of sense with the other eleven. Moreover, the common law will never punish the juror for his verdict. In short, the inquisitor answers to the state; the juror answers direct to God.

[1033] During the middle ages, Aquinas gave sanction and fashion to the forcing of oaths and, thereby, the denying one's right to remain silent: once an inquisitor merely suspects that the accused may have information he desires, the civil law justifies him in compelling the suspect, by force or threat of force, to answer incriminating questions. *See* THOMAS AQUINAS, SUMMA THEOLOGICA, pt. X, qu. 79, art. 1, reply obj. 1. Thus, under civil and canon law, any magistrate's *claim of suspicion* entitled him to commence threats of torture and torture itself. At times, torture was for the sake of torture, without any expectation of information forthcoming from the one tortured.

[1034] *See* LEVY, *supra* note 712, at 65–70. Thomas More defended, advocated, and used torture and the ex officio law, "by which persons could be arrested on secret information and without being confronted by their accusers be condemned in a secret trial." BOBRICK, *supra* note 316, at 128.

[1035] A relationship requiring that one act solely for the benefit of another and in disregard of one's own benefit is the biblical definition of God's love for his people (Hebrew אהב: *'ahav*; Greek *αγαπη: agapay*) and for one's neighbor. The common law calls such a relationship *fiduciary*.

Romans—have set up right forms of government only to see these degenerate and fail because unregenerate rulers lack the moral authority, confidence, and ability to consistently insist upon and practice common-law principles. Personal freedom and political liberty requires a critical mass of individuals morally scrubbed on the inside; only then will truth persist in outward behavior through individual responsibility and self-government.

Because the natural ability to learn and insist upon the right forms of government arises from each person's natural being, God having placed it there, Sir Edward Coke held in *Calvin's* case that the natural law is "written with the finger of God in the heart of man . . . [and it existed] before any judicial [common] or municipal [civil] law."[1036] Without the Spirit, however, man will never sustain the natural. God authors that which is natural; it is necessary and good. Nonetheless, to be of lasting value, the natural (viz., *nature*) needs the Spirit's quickening power. Eternal law becomes beneficial to man only as he exercises his divinely given subjective ability—called the law of nature or natural religion—to discern timeless standards from God's objective revelation (revealed religion): "The eternal principles of natural religion," said William Murray, "are part of the common law. The eternal principles of revealed religion are part of the common law . . ."[1037]

The germination and sprouting of the common-law ideals has arisen among various people groups, but after it arose among the Anglo-Saxons and Danes, these tribes, in the providence of God, transplanted them to British soil, where they matured into a good stand under the watering and sunlight of God's Word.[1038] Scripture has informed the common law,

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[1036] 7 Co. Rep. I, 77 Eng. Rep. 377 (K.B. 1610), *cited in* WU, *supra* note 39, at 189. Coke's words are in keeping with the principle of the Anglo-Saxon folk law or *Volkriht*: law is eternal and unchanging because God is eternal and immutable. God's Word, being settled forever (*see Psalm* 119:89), the LORD is the same yesterday, today, and forever. *See Hebrews* 13:8. It is impossible, therefore, for men to make law; men are able only to discover, discern, articulate, and affirm law.

[1037] Argument of William Murray before the House of Lords *in Chamberlain of London v. Allen Evans, quoted in* HEWARD, *supra* note 386, at 151. Each individual is to seek first—that is, as soon as one is old enough to ponder—God's sovereign administration of government (form) and the outworking of God's, not the individual's own, righteousness (substance). In pursuance of these, men are to pray, "Your kingdom [*βασιλεια* (*basileia*): God's sovereign jurisdiction to administer government] come, your will [God's righteousness] be done . . . ." *Matthew* 6:10. Moreover, God's forms and methods of government are to be an early consideration, that is, in one's youth. "Remember your Creator," says Solomon, "*in the days of your youth* . . . ." *Ecclesiastes* 12:1 (emphasis added).

[1038] But for the steady glow of God's written Word in Britain, the civil-law Code would have supplanted the unwritten common-law tradition. John Wyclif, grasping this principle,

teaching that ultimate and final sovereignty never rests in the gods of fate but in the God of creation alone; all other claims of sovereignty derive from God and depend upon God.

The courts in Britain, from their early days, have acknowledged the common law's Christian character. "There is no act," said Chief Justice Best of the Court of Common Pleas, "which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England."[1039] In England, the ideals of common-law tradition survived, growing to maturity and refinement. Settlers then carried these ideals to North America and elsewhere, where their progeny reinforced and built upon its principles.

§ 4.1.2
Like Principles:
Common Law & Scripture

The Christian religion, when divested of the rags in which they [the priests] have enveloped it, and brought to the original purity and simplicity of its benevolent institutor, is a religion of all others most friendly to liberty, science, and the freest expansion of the human mind.[1040]

The judgments (*doms*, later spelt *dooms*) of the ancient Anglo-Saxon folk assembly called the *moot* were never imperial decrees, as from a greater to a lesser, but were findings, as that of the Jury of one's neighbors.[1041]

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determined to translate the Bible into English as the remedy against the civil-law Code. Wyclif's translation succeeded. "Only in England," writes Bobrick, "was the Bible in any sense a national possession . . . ." By living only on the laurels of their claimed forbearers—as did the first-century Jewish rulers—, Americans will cease from freedom. Just as the well being of crops demands ongoing provision of necessary elements (air, water, nutrients, and sunshine) and constant warding off danger (disease, devouring insects, drought, and death), the life of our common-law also requires tending. God's Word outfits the mind to recognize and reject dangerous doctrines, which tout the human mind as the womb of law, the final arbiter of right and wrong.

[1039] Bird v. Holbrook (C.P., 1828. 4 Bingham 628) (emphasis added). *Bird* is the famous English spring-gun case that served as precedent for the controversial mid-twentieth-century spring-gun cases in the United States.

[1040] *Quoting* Thomas Jefferson. "The common law of England," argued William Murray, "which is only common reason or usage, knows of no prosecution for mere opinions . . . There is nothing certainly more unreasonable . . . more contrary to the spirit and precepts of the Christian religion . . . than persecution." Argument of William Murray before the House of Lords *in* Chamberlain of London v. Allen Evans, *quoted in* HEWARD, *supra* note 386, at 151.

[1041] In the common-law tradition, all human expressions of law—legislation, court opinions, decrees, regulations, and even statements of policy—are evidences of the law and, if on point, are relevant to legal disputes; whereas in the civil-law tradition, the Code, is not

The Anglo-Saxon folk held these judgments to be corroborating, not commanding: divine *affirmations* of an ancient custom discerned afresh and applied anew: an expression of law's application that had existed from eternity past, now made clear through legal conflict. In the mind of the Anglo-Saxon, the moot (Jury) and elders (Witan) delivered oracles, which he took as confirmations of eternal right and wrong—present evidences of the old ways. "Law [to the Anglo-Saxons] is old; new law is a contradiction in terms . . . All [declarations of the assembly are] . . . conceived of as the restoration of the good old law . . . .[1042]

The Hebrew prophets—under like conviction and conscience realization—often prefaced their declarations with "Thus says the LORD."[1043] When the prophets spoke, they re-expressed standards and applications of law that had always existed because God is eternal and omniscient; His standards remain unchanging.[1044] God, therefore, always knowing all, is incapable of learning; never was the time when God was ignorant of any fact of truth and every application of it.[1045] Thus, to the Anglo-Saxon, the Scriptures posed no direct threat to his folk law and government.

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taken as evidence of the law, but rather, the Code is the law. Because common lawyers do not view the makers of a code as the single fountain of law, civilians view common law as disorganized.

The Anglo-Saxon *moot* assembly was a forerunner to our present-day common-law Jury. The common-law tradition depends upon discernment from the independent judgment of individuals: from the juryman, judge, legislator, sheriff, soldier, or sailor. See generally app. 26 of this book, for a discussion of the *fear of the LORD* (יראת יהוה: *yi-rath Yaweh*) as the necessary predicate to independent judgment, by contrasting the *fear of the LORD* with the *panic* or "trembling" of man (חרדת אדם: *ke-radath 'adam*), in light of *Proverbs* 29:25 and 1 *John* 4:18. All implications, including the grammatical construction of the phrase, show that *yi-rath Yaweh* (fear of the LORD) is not a fear of approaching God and being in His presence, but a fear of loosing the yearning to approach Him and be in His presence.

The civil-law culture brings unwillingness to disperse authority and recognize independent judgment and the responsibility going with it. In 1976, a Russian fighter pilot defected by flying his craft to an American airbase in Japan. The United States Navy berthed him aboard a United States aircraft carrier for safe transport to the States. Upon arrival, he said that he was surprised that young seamen aboard the carrier were responsible for the upkeep and operation of shipboard equipment that the Russian state entrusted only to one holding a Ph.D.

[1042] FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 151 (S.B. Chrimes trans., Oxford 1939). Scripture refers to truth previously unknown, but now revealed for all to see, as μυστηριον (*moostayrion*), often translated *mystery*. *See, e.g., Mark* 4:11, *Ephesians* 1:9, *Colossians* 2:2. By contrast, in the Babylonian tradition, a mystery is that which is unknowable except by the priestly cast. The ancient mystery religions, therefore, stand in contradistinction to Scripture.

[1043] Hebrew: כה אמר יהוה (*co 'amare adoni*).

[1044] *See Hebrews* 13:8.

[1045] God has never known—and never will know—ignorance.

Further, God's Word incarnate posed no direct threat to Anglo-Saxon customs. Rather, the incarnation of the godhead in Christ furnished the means to make all things righted by one's gaining a proper and personal relationship with one's Creator through the work of Jesus Christ. The gospel's redemptive power was, and remains, immediate and direct to the individual; further, through such individuals, the gospel, by mediate and indirect means, effects change in others through relationships. Unlike the Anglo-Saxon's *Volkriht*, imperial Rome saw that Scripture threatened its law and government by challenging the Roman emperor's power. In a word, Scripture claimed for Jesus Christ the right of the emperor's usurped title *son of god*.[1046] By contrast, from the fourth to the tenth century, God's Word gave no such threat to the Anglo-Saxons' folk-law tradition because they saw their kings as mortals, limited in power.

The meeting of A.D. 627 between the Christian missionary Paulinus and the pagan King Edwin of Northumbria and his court reveals the power of the early Christian message to the Anglo-Saxon tribes. After Paulinus gave the gospel message, Edwin asked each of his counselors to reply. Without hesitation the pagan high priest Coifi spoke, "Your majesty, let us give careful consideration to this new teaching, for I frankly admit that, in my experience, the religion that we have hitherto professed seems valueless and powerless."[1047] Another of King Edwin's counselors agreed:

> Your Majesty, when we compare the present life of a man with that time of which we have no knowledge, it seems to me like the swift flight of a lone sparrow through the banqueting hall where you sit in the winter months to dine with your thanes and counselors. Inside there is a comforting fire to warm the room; outside the wintry storms of snow and rain are raging. This sparrow flies swiftly in through one door of the hall, and out through another. While he is inside, he is safe from the winter storms; but after a few moments of comfort he vanishes from sight into the darkness from whence he came.

[1046] Mark, targeting the Roman audience, as distinguished from the Hebrews or Greeks, opens his Gospel by introducing his subject coupled with the Roman formula of imperial deity: *Ιησυς Χριστου υιος θεου* (Jesus Christ Son of God), intending a direct refutation of the Roman emperor's claim to deity as son of god. *See Mark* 1:1.

[1047] BEDE, A HISTORY OF THE ENGLISH CHURCH AND PEOPLE 124 (Leo Sherly-Price trans., Edinburgh, R. & R. Clark Ltd. 1955) (A.D. 731); see 2 BEDE, HISTORIA ECCLESIASTICA GENTIS ANGLORUM 13 (Charles Plummer ed., Oxford 1896), for an alternative translation.

> Similarly, man appears on earth for a little while, but we know nothing of what went before this life, and what follows. Therefore if this new teaching [of Scripture] can reveal any more certain knowledge, it seems only right that we should follow it.[1048]

Then the high priest Coifi again confessed the emptiness of the Anglo-Saxon religion and his personal disappointment in it:

> I have long realized that there is nothing in what we worshiped, for the more diligently I sought after truth in our religion the less I found. Now I publicly confess that this teaching clearly reveals truths that will afford us the blessings of life, salvation, and eternal happiness. Therefore, Your Majesty, I submit that the temples and alters that we have dedicated to no advantage be immediately desecrated and burned.[1049]

The counsel of Coifi and his fellow priests shows that the Anglo-Saxons in Britain sought foremost personal peace, not political reform. Once they found the personal peace of Christ that results from one empowered to order one's life according to the orders of the God of order,[1050] they also discovered that the Bible posed no direct threat to the *Volkriht*, the foundation of their ideals of law and government. In the early Roman Empire, Christianity sought to function as Christ had prayed to the Father[1051] and as Paul the apostle had admonished the Church to do: though Christianity stands in clear and direct conflict with the Roman political order, as much as is possible, avoid resistance to

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[1048] *Id.* at 125.

[1049] *Id.*

[1050] See generally app. 3 of this book (discussing שלום: *shalom*, the Hebrew term denoting the proper ordering of one's affairs amidst the disorder, havoc, and confusion of lawlessness).

[1051] *See John* 17:12–18. The use of the Greek preposition *εν* (*in*) in these verses admits only of the meaning *within*, signifying "among." Providence mingled the first-century Christians with the Roman law as the potter's clay mingled with iron in the feet of Nebuchadnezzär's image. They were in this world's order by being *within* Rome's imperial order and *among* Romans, but were not *of* Rome's order (world) because they bore no ultimate allegiance to Rome. See generally § 5.2.3 of this book (discussing the prophet Daniel's Roman Empire as the mixing of Roman civil law). The presence of God's Word in both Anglo-Saxon England and the Roman Empire continually mitigated the usurpations of Roman civil law.

Rome. In contrast, biblical Christianity was not in clear and direct conflict with the Anglo-Saxons' first principles of law and government.

In addition, God's Word never threatened the Anglo-Saxons' folk-law tradition because political unity was not the direct message of the gospel, but its indirect outcome. God's Word aims foremost at direct and individual overthrow of false personal desires, not direct and collective overthrow of false social and political institutions. Then as now, the Christian message stressed personal humility and obedience to the Scriptures, not open threats to Anglo-Saxon political structures. Unity then resulted as individuals devoted themselves to the same written Word of Christ.

Thus, the supreme deity of Jesus Christ, the supreme authority of His Word, and the individual's direct appeal to this authority posed no immediate threat to the folk law or its office of king. Scripture's doctrine of divine providence replaced *wyrd* (Anglo-Saxon for fate), the folk law's chief doctrine. Unlike Rome's emperors, unwilling to tolerate any teaching that might compromise their total power, Anglo-Saxon religion had already limited the power of the king. Because the Anglo-Saxon knew his king to be, as all other men, mortal, he further demanded that the king serve at the advice and consent of the elders (Witan) and *moot* (common assembly).

The mingling of God's Word with the Roman Empire's civil law, however, was an unworkable mix because the Roman emperor claimed to be "the son of [Rome's] god." Though Anglo-Saxon kings at times attempted such claims, these were never basic to their tradition. God's Word will never be the foundation of a system of religion, law, and government that accords to sinful men those powers that Scripture allows to be gathered only in God's Messiah.[1052] In the wisdom of His providence, using the folk law's limited kingship, God uniquely prepared the pagan Anglo-Saxon for the reception of His truth.[1053] "[T]he most

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[1052] *See Isaiah* 33:22.

[1053] Many farmhouses built in the Wabash Valley immediately following the turn of the last century were of a common style: two-story frame structures with seven to ten gables, two chimneys, and a steep, narrow staircase; of sound structure and often built of virgin hardwood. Yet, these houses often suffered one fatal design flaw: the foundations were of fired clay brick—plentiful and cheap, owing to the brick factories near the Wabash River, where good clay was readily accessible. Failing to take into account the soil's extreme softness, builders laid these foundations of brick with neither mortar nor solid footers under them.

Under the weight of the house over years, these loose brick foundations sunk into the soft topsoil, allowing the floorboards of their rooms to rest on stumps that the builders had reckoned too cumbersome to remove; using axes, they had only whittled them low. As these

fundamental concept in Germanic kingship is . . . [that the king] is not a god and not all-powerful, [and is one of] the whole kin, [from among whom, the folk] elect him."[1054] In a word, the king is from the folk, appointed by the folk, and must rule for the good of the folk with their advice and consent.[1055]

As Fortescue said, common-law kingship (executive) is limited because—among other reasons—it is *political*. In Fortescue's day, the Crown remained in direct responsibility to the Parliament, to the people indirectly, and served at the people's pleasure. For example, though the motives of Henry VIII. in returning English autonomy to the English Church were impure,[1056] he recognized that he had precedent in Anglo-Saxon law that the king's office was political (meaning public awareness

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houses' floors settled down, the old stumps remained stationary and slowly raised humps in the floors. Some, hoping to save their houses from this problem, obtained heavy hand jacks, jacked their house up, and off the foundations, blocked it in that elevated position, tore out the faulty brick foundation, and replaced it with a solid foundation set on deep concrete footers. Then, using the jacks, they slowly let their house down to rest on its new foundation.

Like these farmhouses, the old Anglo-Saxon's folk law was a sound *structure*, but was doomed to fail because its foundation was weak; it rested loosely in the world's mire of false religion. Christianity sought not to destroy this structure, but got under it and stabilized it. The Word of Christ replaced the old foundation before the structure toppled, enabling it to steady and bear the weight of changes and additions that God had planned for the structure resting on it and, in addition, to withstand the potentially dislodging encroachments of civil law. As the centuries passed, common lawyers and judges increasingly steadied the common law's structure by relating it to its new foundation, the Word of God.

In areas of California prone to earthquake, the prudent have learned that a fellow will substantially multiply the likelihood of safeguarding his home from damage by simply adding a few extra attachments between the frame of his house and its foundation. At bottom, the stability of the structure multiplies with the amount and strength of connections fastening the foundation and the structure. This is the reason for the Christian stability of the common law and the stability of the nations that it protects; it is also the way to stabilize one's life: relating every detail of one's life to Christ and His Word as the foundation.

[1054] WILLIAM A. CHANEY, THE CULT OF KINGSHIP IN ANGLO-SAXON ENGLAND 13, 15 (1970).

[1055] At the Gettysburg Battlefield dedication service, Abraham Lincoln stated that our government is from, by, and for the people. Lincoln likely paraphrased this from the *Preface* to John Wyclif's first translation of the Bible into English, as it came to Lincoln's attention through a printed speech by President James Madison. John Wyclif said in the *Preface* to his English translation of the Scriptures that the Bible is for the government of the people, by the people, and for the people. *See* DALE CARNEGIE, PUBLIC SPEAKING 345–46 (1955). *See also* GABRIEL SIVAN, THE BIBLE AND CIVILIZATION 174 (1973).

[1056] Though the motives of Henry VIII. were less than pure, he did understand the political feature of common-law kingship. Though he coveted the powers the civil law afforded, Henry viewed the civil law to be the tool of the Roman Church that enabled the unlawful intrusion into England of a foreign power—as also did many English kings before and after him, including Alfred, William I, Henry II, and Edward I. See generally § 3.7.7 of this book (discussing *præmunire* as a common-law expression of patriotism).

was weighty); therefore, he was careful to act only after he knew that Parliament and the country were behind him. Though the political element of the common-law executive is dangerous, the power of public approval places a check upon executive power, demanding that the executive never run ahead of public approval.

In sharp distinction to the civil law, in the common-law tradition the king was deemed neither God, the Son of God, a god, the son of a god, nor held attributes of semi-deification; rather, the Anglo-Saxon king was, as all others, responsible to God. The king was a public officer serving by invitation, and the law limited his power: he acted by the advice and consent of the country.

In addition, because Scripture allowed an individual's direct oath to God alone, Scripture was inoffensive to the Anglo-Saxon's direct appeal to deity in their trial by oath[1057] and in their ultimate appeal to supreme deity through their trial by ordeal. Though first-hand records of appeals to trial by ordeal are unavailable, early writings give descriptions of trial by ordeal:

> *The trial by ordeal* was of various kinds. In one ordeal the accused was required to take a hot iron in his hand; in another to walk blindfolded among red-hot ploughshares; in another to thrust his arm into boiling water; in another to be thrown, with his hands and feet bound, into cold water; in another to swallow the *morsel of execration*; in the confidence that his guilt or innocence would be miraculously made known. This mode of trial was nearly extinct at the time of Magna Carta, and it is not likely that it was included in "*legem terrae*," [law of the land] as that term is used in that instrument. This idea is corroborated by the fact that the trial by ordeal was specially prohibited only four years after Magna Carta, "by act of Parliament in 3 Henry III. according to Sir Edward Coke, or rather by an order of the king in council."–*3 Blacks, one 345, note.* I apprehend that *this trial was never forced upon accused*

[1057] God's law commands that *if* any man swears, he must swear only by the name of LORD and no other; as did God Himself and as Paul the apostle confirmed his statements by oath on many occasions as revealed by Scripture. *See, e.g., Hebrews* 6:13, 16; *Ephesians* 4:17. As it was among the ancient Anglo-Saxons, the common-law trial remains trial by oath, in that testimony under oath establishes all facts, including those inferred from all tangible evidence.

> *persons*, but was only allowed to them, as *an appeal to God, from the judgment of a jury*.[1058]

The Celts, Anglo-Saxons, and Danes observed the right of appeal to the *ordeal*. Though local Roman priests sometimes took part, the Roman canonists—lawyer-priests of church and state—opposed the ordeal because it acknowledged the individual's right of direct appeal to God without Rome as mediator between God and the individual.[1059] Then, in 1215, the Fourth Lateran Council of Rome officially forbade her priests from participation in the ordeal.[1060] Because the Norman kings and the Norman nobility opposed the ordeal in favor of their own trial by battle, the ordeal became unfashionable among all classes. After the reign of John Lackland, no evidence of the Anglo-Saxon ordeal is found.[1061]

Because the record of Scripture is the foundation of the Christian faith, Christianity encouraged literacy among the Anglo-Saxons, which allowed and encouraged a further fastening of the folk law's precepts to God's Word. The *Laws of King Alfred*, penned by England's early Christian king, is such an example. After reducing his native language to writing, Alfred's began his *Laws* with the Decalogue,[1062] followed by a

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[1058] LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 36 (1852) (emphasis in original).

[1059] The Koran also forbids trial by ordeal, presumably, for like reasons to those of Rome's imperial Church.

[1060] *See Fourth Lateran Council*, Ch. 18 (1215), *cited in* J.D. DOUGLAS, DICTIONARY OF THE CHRISTIAN CHURCH 732 (J.D. Douglas ed., 1978).

[1061] Some equate *Numbers* 5:11–31 with trial by ordeal; the biblical concept and the Anglo-Saxons concept of trial by ordeal, however, differ. "It is evident," writes Selbie, "that the efficacy of the [Hebrew] ordeal described is regarded as due entirely to divine intervention; the ingredients employed are innocuous." By contrast, the Anglo-Saxon trial by ordeal was downright dangersome.

[1062] King Alfred put the Decalogue of *Exodus* 20:1–17 in written Anglo-Saxon:

> Drihten waes sprecende thaes word to Moyse, and thus cwaeth: Ic eam Drihten thin God. Ic the ut gelaedde of Aegypta londe and of heora theowdome. Ne lifa thu other fremde godas me.
> (*Lord was speaking these words to Moses, and thus said: I am [the] Lord thy God. I led thee out of the land of Egypt and its thralldom. Not love thou other strange gods [over] me*).

> Ne mine ne cig thu on idelnesse . . . Gemine that thu gehalgie thone feste (reste) daeg . . . Ara thinum faeder and thinre meder . . . Ne slea thu. Ne stala thu. Ne lige thu dearnunga.
> (*Not my name utter thou in idleness . . . Mind that thou hallow the festal [Sabbath] day . . . Honor thy father and thy mother . . . Not slay thou. Not steal thou. Not do thou adultery*).

restatement of the *Law of Moses*, and ended with a summary of the *Acts of the Apostles*.[1063] In accord with the biblical principle, King Alfred states, "Doom [judge] very evenly: doom not one doom to the rich, another to the poor; nor doom one to your friend, another to your foe."[1064] By his *Laws*, Alfred intended to show the consonance of Scripture with the Anglo-Saxon folk law:

> King Alfred's Book of Laws, or Dooms, as set out in the existing laws of Kent, Wessex, and Mercia, attempted to blend the Mosaic code with Christian principles and the old Germanic customs . . . The King in his preamble explained modestly that "I have not dared to presume to set down to writing many laws of my own, for I can not tell what will meet with the approval of our successors." The Laws of King Alfred, continually amplified by his successors, grew into a

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> Ne saege thu lease gewitnesse with thinum nehstan. Ne wilna thu thines nehstan yrfes mid urihte. Ne wyrc thu the gyldene godas oththe seolfrene.
> (*Not say thou false witness against thy neighbor. Not desire thou thy neighbor's inheritance with un-right [lawlessness]. Not work [make] thou thee golden gods, or silver*).

Taken from BOBRICK, *supra* note 316, at 302–03.

Tradition calls the Decalogue the Ten *Commandments*. The Hebrew דברים (*debarim*) signifies, literally, ten *matters* and by extension "judgments"; the Septuagint translates *dabarim* with λογοι (*logoi*). See generally app. 8 of this book (discussing and expositing the imperative and other verb forms used in the Decalogue).

[1063] See generally § 4.3.2.4 of this book (discussing King Alfred's purported inclusion of the Golden Rule in his *Laws of King Alfred* and the distinction between justice and grace).

[1064] *See Deuteronomy* 1:16–17. In this passage, Moses restates God's standards concerning judges:

> I charged your judges at that time, saying, hear the causes [that stand] between your brothers, and judge straight between a man and his brother, and between the stranger dwelling with him. You shall not respect persons in judgment. You shall *hearken* to the small men as [in the same way] you *hearken* to great men. You shall not fear the person of any man because the judgment is to God.

The English language, having caste aside the term *hearken*, uses only the terms "hear" or "listen," thereby forfeiting means to give fitting and efficient translation the key Hebrew term, שמע (*shema*). *Shema* carries a dual meaning, going beyond just hearing and listening. It means "listen and obey," much as the old English *fetch* embraces three actions: to go after a thing, to pick it up, and to return with it. In the foregoing verses, God instructs judges to do more than listen: they are to listen, ponder, and judge. Many judges consider themselves to have fulfilled the requirements of due process by merely listening to both sides. In order for listening to be effective, however, the judge must *ponder* the testimony given and objectively *judge*, according to his well-considered discernment.

> body of customary law administered by the shire and hundred courts which, under the name of the Laws of St Edward (the Confessor), the Norman Kings undertook to respect, and out of which, with much manipulation by feudal lawyers, the Common Law was founded.[1065]

Finally, evidence suggests that the Anglo-American emphasis on local county government arose from the Anglo-Saxon folk law in conformity with Scripture. Likenesses to the ancient Hebrew courts are strong. The polity of the Hebrews through the time of Christ, says Alfred Edershiem, included at least two and as many as five[1066] tiers of magistrates, akin to the American appellate system. The Hebrews likely derived this arrangement from two sources: the plan the priest of Midian and Moses' father-in-law Jethro set forth in *Exodus* 18:13–26, and the plan King Jehoshophat set forth in 2 *Chronicles* 19:8.

The Hebrew system is comparable to that of Anglo-Saxon England. Any tier of judges above the Hebrews' lowest tier of their local Jury was a council of appellate jurisdiction. Their highest tier of judges was the Great Council at Jerusalem called the Sanhedrin: the Hebrew nation's earthly court of last resort. The court just below the Great Council was the Lower Council of Elders; just below *this* Council, each village or town of more than one hundred and twenty households—the Danes' long hundred—maintained its own local Council of Elders, seating twenty-three members, the same number as the traditional American Grand Jury.[1067] Groups each of about, but no more than, one hundred and twenty households, called the *hundred*, were to maintain their own elders, each hundred's set of elders constituting their Hundred or Moot Court.[1068] Last, groups of approximately ten families, called a *tithing*, were to empanel the Jury of twelve if needed. The Hebrew and Anglo-

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[1065] CHURCHILL, *supra* note 62, at 89.

[1066] See generally § 4.3 of this book (discussing the New Testament's reference to the Hebrew courts, their operation, and present application).

[1067] See generally *id.* (presenting and discussing Lightfoot's description of the Hebrews' courts of the first century).

[1068] In time, the Anglo-Saxon's *hundred* became a geographic division without regard to population. The hundred is comparable to, and forerunners of, our present American townships: as men later called shires *counties*; men later called hundreds *townships*. A contiguous grouping of hundreds—as is our present grouping of approximately thirty-six townships—formed a county or, as it was first called, a *shyre* or shire, governed by a *shire-reeve* or sheriff. See generally 2 ALFRED EDERSHIEM, THE LIFE AND TIMES OF JESUS THE MESSIAH 554–56 (photo. reprint, n.d.) (1886), for likenesses between the political, and judicial structure and processes of the Hebrew nation at the time of Christ and those of the Anglo-Saxons in England.

Saxon courts thus both offered the advantage that Blackstone observed of the early Anglo-Saxon tradition: justice available at every man's door.

Though the entrance of God's Word into the pagan Anglo-Saxons' relationships never stopped pagan norms contrary to it in one fell swoop, the power of Scripture's timeless truths—now written in their native tongue and working through their institutions of law and government—was foregone and far-reaching. Then as now, Scripture exhorted the pagan-turned-Christian to advance with caution and to step sure-footed that he "prove up everything and then hold fast to those things that are good,"[1069] that is, in accord with Scripture.

§ 4.1.3
Authority's Fountain

Government always has a religious foundation. This is because government must operate with some authority. To exercise authority there must be some theory of authority . . . If the rulers of the populous hold that man himself is the source of authority . . . then a religious commitment has been made regarding man. He is master of his own fate; captain of his own soul . . . In this case the voice of the people is the voice of God because man is his own God.[1070]

Authority never springs from mortal men. Instead, men must derive authority for government from God.[1071] Thus, authority never originally arises corporately from the people as a democratic concept:

[1069] 1 *Thessalonians* 5:21.

[1070] ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 55 (1974). Culver continues:

> This was the theory . . . underlying the French Revolution. It is the explicit rational of modern secular socialism. It is no accident that the more thoroughly secular socialist political theory controlling a nation becomes, the more sub- or post-Christian it becomes. Even in . . . the United States of America, the actual working philosophy is to regard the voice of the majority as ultimate. Constitutions, the eternal laws of God (the Christian God), and innate rights mean nothing ultimately. The public opinion poll becomes the ultimate instrument of determining policy. An elite party may become the trustee of the nation as in most socialistic states, but in any case man is ultimate.

Id.

[1071] King James I. appointed Hebraist John Overall to the Bible translation team at Westminster. Englishmen respected Overall's learning and understanding. Overall, however, to keep the favor of King James, upheld—as did other translators James I. appointed to provide a new version of the Bible—the divine-right-of-kings doctrine.

> If any man shall affirm that . . . all civil power, jurisdiction and authority was first derived from the people . . . or is originally still in them . . . and is not God's ordinance originally descending from Him and depending on Him, he doth greatly err.[1072]

The difference between common law and civil law on this point controls the outcome of these two traditions: the ideals of Scripture and traditional common law teach that authority flows from its Author, the Godhead, direct to the individual who, in turn, entrusts fitting amounts of that authority to individuals in government. Those charged with the responsibility of government are also responsible to entrust this authority to other men for the administration of government. In any case, each person's responsibility is immediate and direct back to God. Civil law also holds that all authority is from a deity (a man or men deified), but differs, holding that deity dispenses authority direct, only to a select elite, which in turn, dispense it to the few that those elite, in their imperious desire, select.

Thus, civil law's view is absolute: the state gathers all government power and will in the hands of the legislator or legislature. The view of Scripture and common law, however, is dissolute: the three branches of government diffuse authority and power by placing the branches in relationships that check government power and, thus, insure personal liberty—such as freedom of speech, religion, association, and to petition government—; the exercise of which checks state power, further limiting government.

Though James grew up in Scotland under the teaching of the Covenanters, upon becoming king of England he rejected the doctrines of the Covenanters and embraced absolutism. Of all his translators' support of the divine-right-of-kings doctrine, James cherished most that of Lancelot Andrewes. *See* BOBRICK, *supra* note 316, at 221. Earlier, William Tyndale supported King Henry's prerogatives as claimed by the divine-right-of-kings doctrine. William Tyndale, it seems for the same reason as Luther, supported absolute monarchy (the divine right of kings). "He that judgeth the King," wrote Tyndale in *Obedience of a Christian Man*, "judgeth God and dameth God's law and ordinance . . . the King is, in this world, without law; and may at his lust [pleasure] do right or wrong, and shall give account to God alone." DICKENS, THE ENGLISH REFORMATION 73 (n.d.), *quoted in* BOBRICK, *supra* note 316, at 122. See generally §§ 3.8.1–3.8.2 of this book (discussing the civil law's divine-right-of-kings theory).

[1072] GUSTAVUS S. PAINE, THE MEN BEHIND THE KING JAMES VERSION 32 (1959). In 1606, these words came to form one of the canons of the Church of England.

At bottom, the civil-law tradition views the state as deity's manifestation of itself and its power among men, i.e., god on earth.[1073] Any further distribution of authority from the power elite (the state) depends upon the imperious *will of state*. Therefore, in a civil-law system, to recognize the state's ultimacy is to know one's responsibility. On the other hand, the common-law tradition says that Providence allots authority direct to each individual, in varying amounts, at varying times, and for diverse purposes. Further indirect allocation of that authority from those individuals to others depends upon the responsibilities arising from individual relationships.

Thus, the common law teaches that authority operates within families, institutions, and government only as individuals observe responsibilities and rights, reciprocally and relationally. Because applicable common-law standards depend upon the kind of relationship between disputing parties, common law has always esteemed and protected freedom of association, that is, one's freedom to enter and define one's relationships free of state meddling. Further, by protecting one's freedom to choose and define his associations, common law protects the individual's ability to choose the degree of authority he will dispense or receive.

Scripture is clear in revealing how God bestows His authority to the individual. John the apostle writes in his inimitable, straightforward way: "But to as many as receive Him, *to them He gives authority* to become the direct offspring of God."[1074] God bestows authority direct upon each of His people, and in this instance, for a certain befitting purpose. In this verse, John's use of *tekna*[1075] to denote His offspring, further stresses that

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[1073] Such was Hegel's view of the state, which, in Germany, matured into Nazism. Hegel's view is a counterfeit of Scripture's Messianic hope: אמנואל (*Imanuel*), "God with us." Further, the writings of both George Hegel and Thomas Aquinas support Aristotle's concept of man as *ζωον πολιλικον* (*zoan polilikon*: a political animal), albeit by different terminology and for seeming different reasons. Some claim that these two men were far apart in their views; maybe so, but they were close in their conclusions: both were utopian in outlook; both justified the state as the final outworking of nature (the material universe) to which all men owe absolute obedience. *See* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 257–340 (1945), *cited in* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 65–67 (1974). "There is a way seeming right to a man," says Solomon, "but back of it [אחריתה: '*acaretah*] are the *ways* of death." *Proverbs* 14:12. Error leads to death in many ways, but it is always the same death. In this Hebrew text, verses 14:12b and 14:13b stand in parallel poetic structure, placing '*acaretah* in the same structural position and meaning, "a result coming from behind." "Scripture," says Culver, "does not support either Hegel or Thomas [Aquinas]." *Id.* at 67.

[1074] *John* 1:12 (emphasis added).

[1075] Translated with "direct offspring," *τεκνα* (*tekna*) is a term of family endearment, fitting to John's purpose. Scripture magnifies this usage in that God bestows authority upon

God's bestowal of authority upon each of His people is direct, that is never through any intermediary, such as priesthood. Thus, God dispenses His authority allodially to each of His own and even others in His pleasure. Never, however, does God dispense all His authority only to the state in any chief-of-state, ruler or tyrant who, in turn, will retain or dispense it to whomever, in his unrestrained pleasure, he will.[1076] Such is the doctrine of the civil law.

John develops the theme of the new birth of God's offspring as he does his other major themes throughout his five writings: in ever-greater understanding and wonder. His reference to *born ones* is harmonious with his well-known theme called the "new birth," which Christ expounds in *John* chapter 3. Then, in 1 *John* 3:1, John continues exposition of the new birth, "Consider now! What kind of unknown love has the Father perfected toward us that we are to be called[1077] the sons of God [God's direct offspring]; and we are." Wyclif taught that those born of God are sons of God; that sons of God are God's direct creation, and as such, enjoy two benefits: they are the immediate recipients of His deepest authority and the vested heirs of His blessings with Christ.

§ 4.1.3.1
God's Word –*vs*– Justinian's Code

Justinian . . . a Roman emperor . . . was crowned in Constantinople in 527 A.D. At the end of 530, he constituted a commission to review and revise the books "on Roman law of ancient jurists to whom the emperors gave authority to write and interpret the laws." On December 16, 533, the Commission published a 50-book digest of the law. The Digest itself received the force of the law on December 30 of that year.[1078]

His people not only directly and individually, but also affectionately. The Greeks derived *tekna* from the verb τικτω (*tiktoe*), meaning, "to be born." Braid neatly captures *tikto's* familial affection, translating it with *bairns*: the Scots' contraction of the English "born ones," stressing the warm fondness a father holds toward those children born direct out of his own body, viz., *my* bairns (born ones). On the other hand, some have suggested that this term of Scottish English is from the old English "bear," in the sense of carrying a child in pregnancy. In both cases, the idea is the same: a closeness that comes only by blood.

[1076] The Constitution, for example, requires the executive office to dispense authority only "by and with the Advice and Consent of the Senate." Both this phrase and the limitation it makes, are of immemorial antiquity. See generally § 3.2.4 of this book (tracing the concept *advice and consent* at least as far back as a deed signed by the six-year-old–king-to-be Alfred the Great). *See* U.S. CONST. art. II, § 2.

[1077] Greek κλητωμεν (*klaythomen*), aorist subjunctive: "intended to be known as."

[1078] ROUNDS, *supra* note 363, at 668, *included quote from* R.W. LEE, THE ELEMENTS OF ROMAN LAW 26 (1956). *See also generally* BARRY NICHOLS, AN INTRODUCTION TO ROMAN LAW (1962) (providing the fundamentals of Roman civil law).

Ancient civilians (civil-law attorneys) took Justinian's Code to be complete[1079] in its written expressions of abstract principle and reason; but in its particular application, they saw it as complete only if a civilian properly applied scholastic methods of analysis. Civilians were to wring gaps and omissions out of the Code by the torque of pure (unbiased) reason. The civilian still denies himself the benefit of reference to experience, as set forth in case precedent (*stare decisis*). Thus, to the civil-law scholar and jurist, the unaided human mind—subject as it is to mistake, confusion, misinformation, greed, undue influence, and bewilderment—is the final arbiter of law. Safeguards against these blemishes upon human reason, such as common law's due process and *stare decisis*, are not part of the civil-law tradition.

By contrast, the common-law tradition recognizes the impossibility of a lawyer, judge, or juror to know beforehand the law and its lawful application in any particular instance. Thus, the lawyer, judge, and juror, upon facing a new legal conflict, each sees his task to discover the applicable law. "[J]udges do not pretend to make new law," says Blackstone, "but to vindicate the old one from misrepresentation."[1080] To this purpose, and lacking absolute faith in his own subjective reason, the common lawyer applies experience in the form of precedent *and* reason.[1081] The combined wisdom of experience recorded in case precedent compliments and tests misguided human reason.

[1079] Largely, civilians still view their civil-law Code as complete in the sense that it is impossible to add to it or otherwise improve it: "perfected," Latin *perfectus*; Greek *τελειος* (*telios*). Only God's Word, however, rightly claims such completeness. The common lawyer depends upon due process to reveal both the right law and its right application; the civil lawyer trusts the Code to reveal the will of the state, which he believes is the law, and thus right.

[1080] 1 BLACKSTONE, *supra* note 12, at 70. In the common-law tradition, the term *judges* embraces both the judge sitting on the bench and the juror empanelled in the jury box. The judge decides two matters: how the law of evidence will be applied, determining what will go before the Jury; which law is to be applied to the facts. The Jury decides three questions: What are the facts of the case? How the law will be applied to those facts? What is the result or verdict? Thus, the greatest power of the judge is over what evidence the Jury sees and hears; the greater power of the Jury is over how the law applies to the facts and the result.

[1081] The Semitic wisdom literature of the Old Testament is a special species of literature and of "law," in the Hebrew sense of *Torah*. The writers of the Hebrew Old Testament drew their presuppositions from wide observation and experience, while providing the reader with a literary structure (Semitic parallelism in its many forms) that invites the reader to test the author's propositions with sound reason and rational proportion (reasonableness). The writers of *Job*, *Psalm*, *Proverbs*, *Ecclesiastes*, and *Song of Solomon* have constructed these books in Semitic parallelism:

The common lawyer never trusts his mind alone because he is aware that in his weakness he is prone to use reason unlawfully in satisfaction of his bias. Moreover, he never trusts solely in his conscience as his guide because he knows that right conscience requires right knowledge; even though experience brings confidence that his conscience is informed aright, he must make allowance for the possibility that he has misinformed his conscience. He further knows that his bias might compromise his conscience. He believes that he must test reason by experience (precedent) and, in turn, experience by reason. Because of the deficiencies of imperfect conscience and unavoidable ignorance, Hugh Latimer of Cambridge said that when he "began to smell the Word of God" he "forsook the doctors [scholastics] of the schools [universities] and such fooleries."[1082]

In contrast to *Corpus Juris Civilis*, Jesus Christ declares that the Scripture cannot suffer gaps or omissions; upon this statement all

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> Much of the Old Testament is composed in a style and form of language far above that of simple prose . . . *Nearly one half of The Old Testament is written in this poetic style* . . . Its metre is not that of syllables, but of sentences and sentiments . . . The distinguishing feature of [this] Hebrew poetry is now generally acknowledged to be the parallelism of its members.

MILTON S. TERRY, BIBLICAL HERMENEUTICS: A TREATISE ON THE INTERPRETATION OF THE OLD AND NEW TESTAMENTS 90–91 (photo. reprint, n.d.) (1898) (emphasis added). Other Old Testament writers have sprinkled examples of Hebrew parallelism into their writings. *See, e.g., Genesis* 4:23. *See also generally id.* 90–100 (discussing Hebrew poetry's parallelism as a tool enabling accurate interpretation). As a literary device, Semitic parallelism reveals the Hebrews' mental habits in structuring concepts. Parallel thoughts pervaded their thinking: parable, analogy, metaphor, comparison, synonym, tautology, and antithesis.

[1082] Though Oxford and Cambridge never decisively received scholasticism, Latimer and Wyclif are examples of university professors who replaced Justinian's Code with Scripture and scholasticism with common law. Maine denies that Rome's university system—began at Bologna, Italy—ever established its scholasticism in England:

> [I]n Italy . . . the juridical science of modern Europe [scholasticism] took its rise . . . the schools founded by emissaries of the Italian universities in all parts of the continent [were] attempted (though vainly) to be set up in the [British] island.

MAINE, *supra* note 639, at 66.

Much as the founders of Yale intended to correct what they believed to be the doctrinal shortcomings of Harvard, and as Princeton intended to correct the doctrinal deficiencies of Yale, English university students, expelled from studying in Paris, France, came home to England and founded Oxford University. Shortly thereafter, Oxford students founded Cambridge University. God's Word is the remedy for scholasticism's veneration of rationalism. The Word of God, by mastering one's mind, unmasks Christianized rationalism and utterly routes rationalized Christianism. *See* JAMES M. GREY, HOW TO MASTER THE ENGLISH BIBLE 75 (1951) (1906).

biblical truth rests: "[I]t is impossible," says Jesus, "to break apart Scripture . . ."[1083] Christ puts His proposition in the indicative mood, affirming Scripture's internal harmony and completeness. A chain having a gap between links, or even a weak link, proves no chain at all. Civil lawyers, on the other hand, recognizing omissions in their civil codes, stretch the text thin across its gaps:

> The [civil law] courts do not utilize the device of the fiction to fill in a gap in the statute. When such a necessity is imposed on them they have recourse to a means which serves them in every situation: the argument from the text . . . *The judges stop at no subtlety which will give the text the desired sense*.[1084]

By contrast, Christ affirms the Bible's perfection: it neither lacks links, nor suffers weak links, nor can be unlinked. Young puts Jesus' declaration, "[T]he Scripture is *not able* to be broken."[1085] Even if one separates that which the Gordian knot binds, no one will separate Scripture or that which it binds. Since it is impossible to pull apart or

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[1083] *John* 10:35. "*ει . . . ου δυνατα*ι [impossible] *λυθηναι 'η γραφη . . . .*" Jesus speaks in the indicative mood; that is, in the view of the speaker, the statement is true. John Locke accepted Jesus as the authoritative proposer of doctrine because the incontrovertible evidence of His miracles established His credibility. *See also* WINTERS, *supra* note 39, at ch. 4, § 3.5. See generally app. 23 of this book (discussing the inconsistency of holding the Bible to be the Word of God, while presuming it has errors).

[1084] L.L. FULLER, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 542 (1930–1931), *quoting* LECOCQ, DE LA FICTION COMME PROCÉDÉ JURIDIQUE 251 (1924) (emphasis added).

[1085] YOUNG'S LITERAL TRANSLATION OF THE HOLY BIBLE (Robert Young trans., Greater Truth Pub. 2004) (1862) (emphasis added). Young's translation here is true to the original but is clumsy English. The writer suggests, "It is impossible to break apart the writing." At the time Christ made this statement, it was true and remains so.

About thirty-eight years after the LORD gave the principles of His law to Israel at Sinai, Israel found need of more detail in the law's expression. *See Numbers* 27:4. The Lord confirmed Israel's finding, providing even further application. *See, e.g., Numbers* 27:5–11. The LORD opens His affirmation of the plaintiffs' request with the Hebrew כֵּן (*cain*), meaning to be *firm* or *straight*; "correct" is an accurate translation of the Lord's response. In Modern Hebrew, *cain* means "yes." Additional application of the expressed principle implies no flaw in the principle, but rather, shows its vibrancy. Thus *Deuteronomy*, the Old Testament book following *Numbers*, provides even more acute expressions of the leading principles of law as it enlarges the application of those principles to facts and circumstances theretofore unaddressed. Indeed, man continues to discover intricate ways to fulfill God's requirements and to violate God's broad standards; thus, in response to these experiences, courts multiply their recognition of ways to fulfill responsibilities and fashion evermore-precise prohibitions against wrongdoing. With discipline, the individual will also discover new and evermore-precise ways to fulfill law's requirement to love his neighbor.

separate Scripture, it follows that Scripture suffers no gaps or omissions, "[t]he law of the LORD being *perfect* . . . ."[1086]

§ 4.1.3.2
God's Word –*vs*– Greek Thought

At times, America's Founders cited the Greek theorists and their Roman progeny for support of their common-law ideals. The American ideals of freedom, however, descended neither from the Greeks nor from their cultural victims the Romans;[1087] nor did these descend from Rome's universities and her scholastic tradition. Greco-Roman scholasticism's fundamental doctrines, advice, and ways concerning theology, law, and government stand contrary to the Word of God and the common law. Individual joy and contentment, authority and power, and good government will come only as one neither "walks in the advice of the wicked, nor stands in the path of sinners, nor sits in the seat of scoffers,"[1088] but rather, as one finds his delight in the law of the LORD, meditating in it both day and night.

Even though our founding fathers sometimes cited Greek writers, among their writings is a significant absence of familiarity with Rome's civil law and its scholastic method;[1089] this absence is no accident. Early on, men such as John Wyclif and Hugh Latimer rejected the university schoolmen's ultimate faith in the trained human mind and instead took individual and direct reliance upon God's Word written as the foundation of reliable reasoning. Moreover, in order to channel and translate the ideals of God's Word into practical application in law and government, they labored to replace civil-law control of their universities with teaching of the common-law tradition: English common lawyers

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[1086] *Psalm* 19:7. Hebrew, תמים (*tamim*): meaning complete, whole, without loss, omission, or blemish.

[1087] The Romans defeated the Greeks on the field of battle. The Greek culture, however, ultimately subdued the Romans, thereby accelerating Rome's destruction.

[1088] *Psalm* 1:1.

[1089] The scholastic method gained prestige in medieval Europe as the methods of Rome's scholastic doctors replaced the influence of the Church fathers. In support of Justinian's *Corpus Juris Civilis* and the civil-law theories underlying it, Rome's doctors venerated human reason as the worthy source of law. They based this veneration upon the unfounded assumption that when Adam rebelled against his Creator and fell into sin, the human mind remained untainted: brought down to a neutral (amoral) position from which man can lift himself, but never brought low to depravity, from which he is unable to, by his own strength arise. Rome's doctors taught that the conclusions reached by those disciplined to the rules of logic set forth by the Greeks, such as Aristotle, are trustworthy.

countered the civil law's encroachment into the courts through the common-law Inns of Court.

The opinion of Lord Coleridge in *Regina v. Dudley and Stephens* contrasts the living Christ with dead scholastic doctrine. The facts of *Regina* are the modern humanist's stock situation ethics hypothetical: the case concerned the murder and cannibalism of the weakest of three British sailors by the other two, while shipwrecked, set adrift, and starving on the high seas. In his opinion, Lord Coleridge distinguishes the principles of common law from "cheap display[s] of commonplace learning . . . from Greek and Latin . . . principles of heathen ethics . . . It is enough in a Christian country," says Coleridge, "to remind ourselves of the Great Example which we profess to follow."[1090]

One can learn from the mistakes of the Greeks and Romans and gain wisdom from the negative experiences resulting from these mistakes. But small profit comes from *devoting* oneself to the methods of Greek thinkers such as Aristotle, contrasted to the benefits that grow from deep understanding of God's Word: the written revelation of the perfect thoughts of the Maker of heaven and earth. Socrates produced Plato, Plato produced Aristotle, and Aristotle produced Alexander, calling him the most ruthless of his students. By brutal tactics, Alexander set out to conquer the world. Reports indicate that he drank himself to death by his mid-thirties, dying with the hope of being elevated to the pantheon by receiving the title *son of god*. Alexander the Great learned the Greek tradition well and suffered the wages of its gods, but the true God—the Maker of heaven and earth—has better things in store for His followers.

Familiarity with the foundational fallacies of the Greek thinkers is useful, but devotion to their methods and the reliability of human reason to arrive at truth without testing it against God's eternal standards will bring destruction. Moreover, Greek scholasticism in law and government has revealed its flawed essence through Greek culture. The early Romans, though pagan, nonetheless exercised of their natural God-given ability[1091] to discern the dangers of Greek culture. "For many years," says B.F. McClerren, "the Romans would not permit the Greeks to teach their children because many of them were homosexuals."[1092] Lacking God's Spirit, however, the Romans' resolve to persist in resisting the seductions

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[1090] Regina v. Dudley and Stephens, Eng. Rep. 61 (Q.B. 1884).

[1091] See generally § 5.1.2 of this book (discussing every person's God-given capacity to discern right from wrong).

[1092] Letter from B.F. McClerren to Brent Winters 1 (7 Feb. 2005) (on file with author). Mr. McClerren (retired) taught Greco-Roman rhetoric.

of Greek culture failed: seduction lulled Rome to sleep and she drowned in a sea of sensuality. God's Word stands available; as did Mary, one must choose the necessary thing.[1093] The Word of God is able aplenty; life is too short for devotion to contrary doctrines.[1094] One is best able to recognize and counteract error by devoting one's understanding not to error, but to truth.

§ 4.2
Common Law:
One Source by Three Channels

[The court,] not the legislator or the scholar, creates the common law.[1095]

Law is a rule of action given from the Creator to the creature and, thus, is always consonant with the character of the Creator; any act, forbearance to act, or thought contrary to the character of the Creator is lawless. Thus, to avoid lawlessness, man the creature must learn those standards consonant with the Creator's character. Such standards of law reveal themselves by three channels: the law of nature or natural law (discovered by discernment founded upon experience, whether one's own or another's), the law of revelation (discovered by study founded upon the Word of God written), and human laws (founded upon both of the foregoing). Any standard for human action running afoul of these three channels is false law, which is no law at all.[1096] Any expression of law,

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[1093] *See Luke* 10:42.

[1094] *See* GARY AMOS, *The Philosophical and Biblical Perspectives that Shaped the Declaration of Independence*, *in* THE CHRISTIAN AND AMERICAN LAW 49–82 (H. Wayne House ed., 1998) (demonstrating that the Founders never derived American first principles of law and government from Hellenistic, Greco-Roman political theory).

[1095] Harlan Fisk Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4,6 (1936). In the common-law tradition, the courts embrace all participants: judges, jurors, the parties, lawyers, and appellate judges.

[1096] Thomas Cooley objects to the phrase *unconstitutional law* because misleading: any expression of government labeled as law but conflicting with the Constitution, is no law at all and never has been. By the same principle, the phrase *unlawful law* is a misnomer because true law, by definition, is truth; truth is never unlawful. Legislation, regulations, and judicial decisions, however, are at times flat unlawful. Even when legislation, regulations, and judicial decisions are lawful, governments and courts sometimes apply these in an unlawful way, that is, to achieve an unlawful purpose. Thus, even though a law is right and is applied right, if either its passage or its direct application is done to achieve a remote wrong (an indirect wrong effect), that use of the law is unlawful. *See* 1 *Timothy* 1:8: "But we understand that the law is good [*καλος* (*kalos*): produces a favorable result because it springs from, and is according to, the law's good essence or *αγαθος* (*agathos*)], if it is used in a lawful manner [*νομιμως* (*nomimos*), adverb: by a proper process, i.e., lawfully].

then, to be valid, must derive all its authority and power, either direct or indirect from the Creator, the fountain of all truth. In a word, pronouncements of the state are subject to principles found in the law of nature and the Word of God written.

The Creator having entrusted man with His earth, has charged man to care for it according to His law. In no sense, then, is any man God's free moral agent. Indeed, the gist of the agency relationship is that the agent is never free to act either contrary to the will of the agent's principle or contrary to law. In short, an agent's acts are lawful only within the scope of authority his principle has given him. Because any agency said to exist between man and his Creator never grants any right to choose evil, man's agency relationship with God never frees him to knowingly follow a desire contrary to God's. Indeed, God enjoins man from evil. God, however, demands that man exercise discretion in making moral decisions—what is right and what is wrong, what is good and what is evil. Thus, one's agency confines one to act within the scope of authority given, i.e., to do right. Even while on an otherwise harmless frolic outside of one's duty to God, the authority of one's agency ceases.

God has created man with innate recognition of his Creator, upon which man is to base his reason, allowing man to discover in general and apply in particular the standards consonant with the character of his Creator: the immutable laws distinguishing good and evil. It is beyond dispute that all men, once they have discovered the principles distinguishing good and evil, can recognize them as such. For example, all recognize and agree that we ought to do what we have promised and we ought never trespass upon the person and property of another.

Man's natural ability to acknowledge God as Creator and to use his native reason to discern, recognize, and follow the right course of behavior as opposed to the wrong one is above all other duties. Man's use of the law of nature (man's *capability* to discern right from wrong) is binding upon Adam's entire race, in all places and at all times. All experience teaches, however, that the exercise of right reason, standing alone, is unreliable: reason remains either unused or used in a flawed manner due to wrong desire, ignorance of facts, or misunderstanding of facts. Further, man's reason is fogged, flawed, excited by passion, clouded by prejudice, tainted, corrupt, and full of error for which God demands that man must find remedy and make allowance. The doctrine behind the civil law teaches that man's reason is never inherently bad, but only less than good and if disciplined to the scholastic method,

trustworthy.[1097] God's Word has no such requirement, teaching instead that for human reason to be of worth God must grant the capacity to use it for purposes other than selfishness and man must found it upon the Word of God.

The Creator is pleased to provide for the frailty and ignorance which attends man's application of reason; thus, He has "at sundry times and at diverse manners"[1098] reinforced the law of nature by direct revelation: the Word of God written. "The doctrines thus delivered," says Blackstone, "we call the revealed or divine law, and they are to be found only in the holy scriptures."[1099] Indeed, knowledge of the truths of God's written revelation are attainable by application of reason to God's general revelation (creation), but because man's reason is corrupt and unable to always draw the right inferences, God, in his goodness, has given His standards of moral precept in writing. The Word of God written is, from the human view, of much more reliable authority than the natural law (more accurately, the natural ability of man to discover law) because man's bias makes the law of nature less trustworthy. To the Creator, the standards He reveals in the law of nature are clear and unambiguous, but to man, having fallen from his first estate, these can appear unclear.

Even with the Word of God written at hand, man must apply reason to its use in order to discern its standards: in many cases, one step inferences are necessary. For example, God told the ancient Israelite, "You shall not to murder your neighbor." The reader today, by a one-step inference, concludes that this standard applies to him as well. Likewise, Paul the apostle addressed the believers at Galatia: "The just shall live by faith." Though the present-day reader is not a first-century Galatian to whom Paul wrote the epistle, the reader must nonetheless, by simple inference, conclude that this standard applies to him as well.

The difference between the law of nature (the capability of man to discern the law) and the Word of God written is that the Word of God written is undoubtedly clearer in declaring the principle. For mankind, the written Word provides the fixed standard. From God's perspective,

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[1097] The religious doctrine at the foundation of the civil law teaches that man's reason, though flawed, is never inherently bad, but rather, merely *less than good* and redeemable.

[1098] *Hebrews* 1:1. The aorist tense here, used both of God's speaking though His prophets (*λαλασας: lalasas*) and by His Son (*ελαλησεν: elalaysen*), denotes the completed quality of that which Scripture records the prophets and God's Son have said. The Word of God written, being complete, all are justified to rely upon it in two respects: as direct revelation concerning right and wrong and as the foundation from which to draw direct inferences necessary to application of its standard.

[1099] 1 BLACKSTONE, *supra* note 12, at 42.

however, both are of equal authority, obligating one never to juxtapose the two in competition.

To sum up, the law of nature and the Word of God written lay the foundation for all valid human pronouncements of law and are superior to human pronouncements inconsonant with them. Human law—whether from a parent, a court, a legislature, or a regulator—, to be valid, must be consonant with the eternal law as found in the law of nature and the Word of God written, and in subordination to these. For example, a law limiting the speed of motor vehicles to seventy-five miles an hour, though neither commanded nor forbidden by the superior law of nature or the Word of God written, is un-repugnant to these, and is, therefore, valid and to be observed.

§ 4.3
The Jury in Scripture

The Bench of Idiots, also called the Bench of the Unauthorized, was of private persons having not their authority from the higher courts, but rather, from the people, each juror being drawn by the people and from among the people to arbitrate and judge matters in differences between the people. Such are the least-esteemed of which the apostle refers and before whom he desired that Christians bring causes, one between the other.[1100]

The Jury stands at the center of the common law because of not only tradition and the consensus of nature, but also by the authority of God's Word written. Moreover, God's Word sets the qualifications for judges. Those esteemed of least authority within the local Christian assembly are more fitting to judge disputes between its members than are judges that follow principles of Roman civil law:[1101]

> Dare any of you, having a difference against another, to put yourself for judgment *upon* the unjustified and not

[1100] Brent Allan Winters. The Hebrew's *Bench of Idiots* was so called in the sense of the Greek term ιδιος (*idios*), meaning of one's own. *Idios* also signifies that which one does alone, separate, and independent from any other. When the term refers to jurors, it stresses the duty of each juror using his own discernment and judgment, independent of any other.

[1101] Because Rome's pagan magistrates exhibited character unworthy of one's trust to rightly judge disputes over property and rights, Paul admonishes those of the Church assembly having a grievance against another in the assembly to never rely upon Roman judges to determine their rights and property. He encourages them, instead, to lay their grievances upon a Jury drawn from the assembly, none of which holds any position of authority of esteem.

> *upon*[1102] the saints . . . Do you not know that we shall judge angels, as much as *matters concerning this life*?[1103] If indeed, therefore, you *conduct courts*,[1104] *empanel*[1105]

1102 *Επι* (*epi*: upon). The apostle frames the standard for trial by jury within an admonition. Nonetheless, his use of the preposition *epi* gives the same concept as the early common-law Jury trial demand that the plaintiff subscribed to his complaint: "And of this, the plaintiff puts himself *upon* the country," i.e., he relies upon the judgment of those that live about him in the countryside. The common law called such words the plaintiff's *conclusion to the country* or *going to the country*.

Nowadays, though the words have changed, the principle remains: in a common-law country, the plaintiff or defendant desiring trial by jury must include the words *Jury Trial Demanded* at the beginning or the ending of his first pleading filed with the court, whether complaint or answer. Otherwise, he risks waiver of his right to trial by jury. To demand trial by jury is to rely "upon" the judgment of the Jury and not upon the judge: a lone employee, says the Supreme Court, of the state.

In 1 *Corinthians* 6:1, the apostle uses *epi* twice: first, to denote one's resting the protection of one's rights upon Rome's *unjust* magistrates; then, to denote putting the protection of one's rights upon the *saints*. The apostle excuses none from shame for failure to demand a Jury of judges of those least-esteemed in the assembly to decide their disputes: *Τολμα τις υμων εχων προς τον ετερον κρινεσθαι επι των αδικωνκαι ουχι επι των αγιων. Id.*

1103 The apostle's reference to judgments of *matters concerning to this life* (*βιωτικα: biotika*) precludes judgments of life and death (viz., capital cases). Rome forbade the Great Sanhedrin of Israel and her lower courts to exercise the power of judgment in capital cases. *See, e.g., Luke* 23:1, where the Great Sanhedrin referred the case of Christ to the inquisition of Rome's governor Pontius Pilate. Likewise, imperial Rome later forbade the early Christian assemblies from exercising the power of ultimate judgment in capital cases. The apostle uses *biotika* as understood by the Hebrews: to signify matters concerning the common affairs of this life—דיני ממונו (pecuniary judgments) as distinguished from נפשות דיני (judgments of souls), i.e., capital judgments.

Rome, therefore, placed capital judgments wholly in the power of her magistrates. At least 40 years before the Roman commander Titus destroyed the Temple and the records it contained (A.D. 70), and possibly earlier, Rome forbade Israel's Great Sanhedrin—the Hebrews' exclusive and mandatory court of last resort for capital cases—from determining capital judgments and authorizing executions. See generally § 4.7 of this book (discussing jurisdictional and evidentiary standards in Scripture for capital punishment). Then, many years after the times of the apostles in the days of Rabbi Simeon ben Jochai, Rome took also from Israel's courts the power of pecuniary judgments.

During the times of the apostles, however, Rome allowed Israel to exercise the power of pecuniary judgments. Doubtless, the early Christian assemblies also—which the Romans hardly, if at all, distinguished from the Hebrew tradition—exercised pecuniary judgments. Judgments for damages in money, therefore, were within the compass of the Church at Corinth; thus, the apostle admonishes the Corinthians to exercise their authority by empanelling the Jury.

1104 *To conduct courts: κριτηρια* (*kritayria*). The earliest examples of the Greek noun *kritayria* include the sense "standard" or "test" (rule of law), as in the modern English cognate "criteria": a standard to measure against. Modern linguists later thought *kritayria* came to signify courts. Since the discovery at Qumran, however, linguists now prefer the sense *conduct of legal process*. In support, Bauer cites the first-century phrase discovered among the Dead Sea Scrolls at Qumran, *κριτηριον γενεσθαι* (*kritayrion genesthai*): "legal action becoming," or being conducted, as opposed to a legal action merely existing or filed. By distinction, *kritayria* signifies the conduct of trial or, if used in the civil law and Greek sense, an inquisition—not the court itself or its outcome (judgment or decree), but the

the ones least-esteemed in *the Church*.[1106]

This passage of Scripture demands empanelling a Jury of those not holding official positions of authority in the assembly of believers. "[T]he ones least esteemed[1107] in the Church"[1108] are to decide differences

process of the court in reaching judgment. *See* SUPPLEMENTUM EPIGRAPHICUM GRAECUM VIII (Hondius ed., 1923–1928), *cited in* WALTER BAUER, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE 453 (William F. Arndt & F. Wilbur Gingrich trans., 5th ed. 1979) (1958). If used, however, in the natural-law sense, *kritayrion genesthai* signifies the common-law kind of process due each litigant: notice to the opposing party, a genuine opportunity to be heard, and loyalty to fair play in a confidence that right will prevail.

[1105] *Empanel:* καθιζετε (*kathidzete*). The stem is intensive: "deliberately seat" as judges. Whether *kathidzete* ("set," in the sense of empanel) is imperative (*do set*) or interrogative (*do you set*?) is in dispute because both cases of this verb share the same form. Thus, context governs. On the whole, the imperative is best. Farrar paraphrases the passage well, "Dare they, the destined judges of the world and of angels, go to law about mere earthly trifles, and that before the heathen? Why did they not rather set up the very humblest members of the Church to act as judges in such matters?" The apostle gives a severe reproof for what they were accustomed to doing, while enjoining them to cease doing it.

The phrase "to judge" is not in the original text, which has only καθιζετε (*kathidzete*: "put in the chair" or "set"). Jerome, however, added it to the Latin Vulgate version, to which agree both the Syriac version ("they, which are despised in the Church, you set *for judgment*") and the Arabic version ("make them [Semitic causative stem] to sit *as judges*"). The common-law juror is not a volunteer: the law causes him to serve; if drawn, he does his duty but would likely rather be elsewhere. See generally § 4.3.3 of this book (discussing the advantages of mandatory Jury duty as opposed to volunteer jurors).

[1106] 1 *Corinthians* 6:1, 3–4 (emphasis added).

[1107] *The ones least-esteemed:* τους εξουθενημενους (*tous exouthenemenous*). The term means contemned or regarded as worthless. According to some, *tous exouthenemenous* signifies the pagan magistrates in whose virtue, piety, and qualifications for giving just judgment Christians lack confidence: whose judgment must be regarded as of little worth, and likely wrong. That the pagan magistrates were corrupt, history is sure. Many were men of abandoned character and dissipated lives, easily bribed and, therefore, untrustworthy. According to this view, the apostle reproves the Corinthians for taking their disputes before Rome's civil law tribunals of *civilians*: civil lawyers and judges.

The forgoing view, however, is weak: neither the vocabulary nor the grammar supports it. The apostle never applies *tous exouthenemenous* to Rome's pagan magistrates, but rather, to those least-esteemed or despised among the Christian assembly. Referring to the lowest (foundational) order of judges among the Hebrews (the Unauthorized Bench), the apostle instructs Christians to empanel those least-esteemed from among their assembly to determine their legal disputes, instead of going before the civil-law magistrates. But (say some), Paul would never have recommended the least-esteemed to decide their causes; he would rather have recommended selection of the most wise and virtuous among them. This (these say), is proved by 1 *Corinthians* 6:5, where, in directing the Corinthians to settle their matters among themselves, Paul asks whether there is not a "wise man" among them, proving that he desired their difficulties adjusted, not by the most obscure and the least-respected members of the Church assembly, but by those wise and discerning members.

This view errs, however, assuming—against the plain sense of the language—that those without the esteem of his fellow man must also be unwise. Though *tous exouthenemenous* refers to the despised, it never follows that being despised also demands being unwise. For

between its members concerning rights, property, and rights in property (*βιωτικα: biotika*, i.e., matters concerning this life on earth). Tyndale denotes such differences with the phrase "brother *going to law* [1109] against brother."

In so directing, says J.B. Lightfoot, the apostle alludes to Israel's *Unauthorized Bench*: the Hebrew court of first resort below the four appellate courts constituting the Hebrew juridical hierarchy, listed in order of descending appellate authority as follows:

1. The Great Sanhedrin of seventy-one elders, which sat in Jerusalem.
2. The Small Sanhedrin of twenty-three elders—the same number as the common-law Grand Jury—, which sat in each large city outside of Jerusalem.
3. The Bench of Twelve—the same number as the common-law trial or Petite Jury—, which sat in each synagogue.
4. The Authorized or Authentic Bench.
5. The Unauthorized Bench—comparable in substance and function to the common-law trial or Petit Jury.

The Unauthorized Bench was so-called because—unlike the Small Sanhedrin, the Bench of Twelve, and the Authorized Bench—it received

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example, consider the following uses of the root *εξουθενη* (*exouthenay*): *Luke* 23:11 (Herod and his soldiers "despising" Christ, *Mark* 9:12 (passive, i.e., they "mocked" Christ), *Acts* 4:11 (the stone [Christ] the builders "despised. Cf. 1 *Corinthians* 1:19–31, 1:28, for commentary concerning the concept "despise" in Scripture. Cf. *also* 1 *Corinthians* 6:4, *Galatians* 4:14: "contempt," "lack of respect," "despise."

[1108] *In the Church*: *εν τη εκκλησια* (*en tay ekklaysia*). By the letters, the phrase translates, "among the ones called out." Greek writers used *tay ekklaysia* to denote an aggregate of individuals, each having been directly summoned by a common authority (a specific call), under pain of penalty for failure to comply. Such is the sense of *tay ekklaysia*, the term translated "church" in the New Testament and as used by the early Greek writers such as Aristotle and Thucydides, the Septuagint translators (*see, e.g.*, 1 *Kings* 8:65), first-century writers in the Roman Empire (*see* ADOLF DEISSMANN, LIGHT FROM THE ANCIENT EAST 112 ff., 1927), and the New Testament writers. That the Church (*tay ekklaysia*) embraces only those individuals targeted and "summoned out," is an accurate description for three reasons: the root of *ekklaysia* (*καλειν: kalein*), signifies the act of summoning, the prefixed preposition *εκ* (*ek*) expresses a summoning "out from among," and "summoned" in first-century Greek culture includes the warning of penalty for the summoned one's failure to obey.

[1109] See generally § 4.4 of this book (discussing William Tyndale's phrase *go to law* in translation of *κρινεσθαι* (*krinesthai*) 1 *Corinthians* 6:1, 6, 7).

not its authority from the Great Sanhedrin, but from the parties in controversy and from the people in general.[1110]

Paul's phrase *the ones least-esteemed*, demands persons of no repute: as with the Hebrew's Unauthorized Bench, those chosen for the particular purpose of settling a dispute between parties, there keeping the dispute from going before the regular magistrates. The verse following, says Lightfoot, makes clear that the apostle refers to this court of first resort of the Hebrews.[1111]

By setting those to judge, therefore, who are least-esteemed in the Church, Paul does not insist upon only those of the lowest stations and of the meanest abilities; for in the next verse he requires a wise man for such business: the laymen, holding no office of authority in the Church. Such jurors, therefore, drawn and empanelled to judge particular cases, need never be men of material means. By direct inference, the passage further forbids empanelling of those occupying positions of authority, such as teaching or ruling elders,[1112] because such men hold the esteem incident to their office.

Unlike Rome's bringing of order to chaos by central imperial command, force, and domination, the apostle admonishes the Corinthian believers to remedy lawlessness[1113] by encouraging those among them having disputes to empanel juries of judges according to the divine pattern: i.e., separate from, and independent of, the other offices of government.

In summary, to decide disputes as they arise, the apostle admonishes the Corinthians to draw and empanel judges from the body of believers that fulfill two requirements: they must be the least-esteemed in the assembly and they must be wise. Use of such judges brings benefits

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[1110] The Hebrews, Lightfoot observes, besides their Great Sanhedrin of seventy-one men in Jerusalem, their Small Sanhedrin of twenty-three in their cities of note, and their Bench of Twelve in every synagogue (often sitting in a panel of three, or triumvirate, as do our American appellate courts), had also two sorts of benches that judged lesser matters. The Hebrews called the one, the *Bench of Authorized Persons*: experienced men of which the Sanhedrin approved and to which it had dispensed its authority. They called the other the *Bench of Idiots*—so called in the sense of the Greek term ἰδιος (*idios*): unique, one of a kind, *su generis*—those called to sit in a particular case only, bringing to bear the *idios*-syncracies of the conscience of each juror.

[1111] See generally § 4.1.2 of this book (citing Edershiem's view of the Hebrew courts in the first century).

[1112] *See, e.g., Acts* 14:23, 1 *Timothy* 5:17, *Titus* 1:5, *James* 5:14, 1 *Peter* 5:1.

[1113] The late Ray Steadman, in recognition that the confusion surrounding the Church where he served was comparable to that of first-century Corinth, stressed the present applicability of Paul's epistles to the *Corinthians*, calling these first and second *Californians*.

comparable to the use of the common-law Jury. For example, in the event of litigation, knowing that a Jury of those least-esteemed[1114] will sit in judgment upon one's rights and property but being ignorant of who those judges will be, will motivate every member of the assembly to respect all other members at all times.[1115] So also, in a common-law country, where any one of one's neighbors is a possible judge of one's life, liberty, or property, one has inducement to respect even the otherwise disrespected. As in the marketplace, where those in business are motivated to be kind to all (as much as lies within them) or risk losing business, the man of means, unwilling to risk his property in legal dispute, will be kind to all.

Further advantages attend use of the Jury. *First*, by following Scripture's pattern for courts and the Jury, both in and out of the Church, the giving of special preference to professional judges will cease because there will be none: rather, judgment of differences will belong to the neighbors of the parties in dispute, not to an official hierarchy of state paid magistrates. Here again, the common law is consonant with Scripture.[1116] *Second*, each individual being a potential juror diffuses responsibility, jurisdiction, and power. *Third*, the Jury removes the burden of judgment from the elders, allowing them more time to study and teach the Scriptures, which is their foremost responsibility.[1117] *Fourth*, use of the Jury separates the judicial office from the teaching and ruling offices. *Fifth*, use of the Jury makes every person in the assembly a potential agent of God's justice and mercy. *Sixth*, use of the Jury will remove the monopoly of court business from the courts outside the Church, thereby diffusing and dispersing judicial power, relieving clogged courts outside the Church, and reversing the trend of concentrating power in the caprice of professional judges at the expense of the common-law Jury's benefits. *Seventh*, use of the Jury in the Church assembly will set the right example for government to follow outside of the Church assembly.

[1114] Such a *jury of bystanders*, were in former times called *jury de circumstantibus*.

[1115] The use of the Jury never establishes any duty to be respectful to others, but indeed reinforces such duty, which each person has already. "Honor all men," writes Peter. *See* 1 *Peter* 2:17.

[1116] Jesus condemned the Pharisees for loving the preëminence among all others and the deference of others: the seats of honor at feasts and in the synagogues, the special salutations made to them when seen on the streets, and to be addressed with undue titles of honor, such as father or doctor. *See Matthew* 23:2–10.

[1117] *See Acts* 6:2. The twelve Disciples found that to leave off their attention to the Word of God would *displease* (*ουκ αρεστον: ouk areston*) God. The New Testament most often uses *areston* to denote the pleasure of God.

While England's early Church and then her chancery (equity) tribunals remained under the power of Rome's law and priesthood, civil-law principles and inquisitional methods dominated, threatening common-law freedoms such as due process, the Jury, and adversarial trial. Even though presbyterian forms of church government arose after the Reformation, use of the common-law Jury never became preeminent in Church government. Good government, nevertheless, demands the Jury of judges as set forth in 1 *Corinthians* 6:1–6. Further, acting upon the apostle's words, demands reliance upon the native ability of each juror, by independent judgment, to discern right from wrong, by natural, or nature's law.[1118]

Scripture places the burden on each person for putting into practice the apostle's rebuke to use the Jury. Two characteristics of Paul's epistles to the Corinthians are indispensable to understanding their purpose: Paul directs the epistles to every person in the assembly and not to the leadership only; he thus means to motivate the individual to inform his conscience aright and to discern right from wrong in each case. Paul provides guidance not commands. Thus, both epistles charge each person with the exercise of discernment. Therefore, those having a dispute are responsible to agree upon a group of those least-esteemed (jurors) to decide their dispute. The leadership may assist if the parties cannot agree, but those in dispute must be the initiators to empanel the Jury to consider their case.

§ 4.3.1
The Oath:
The Jury Foundation

By no human constitution, not even by an oath, can we be bound to ignore laws that rest undoubtedly upon divine authority.[1119]

The juror is an oath taker. The Norman French singular *juror* denotes one having taken an oath; the plural *jury* signifies those together having taken an oath. The common-law Jury are those "men good and true," sworn to hear evidence, empanelled to look into the facts of the case before them, and to make findings according to truth and right. The Jury

[1118] *See Romans* 2:14–15. See also generally § 5.1.2 of this book (discussing God's universal stamp on each person enabling the discovery and discernment of right from wrong behavior: i.e., law).

[1119] John Pecham, Archbishop of Canterbury 1279–1292.

comes into being at empanelling: the completion of every juror's oath of faithfulness to truth of fact and law. The juror's duty never arises because of his oath; his oath, rather, is meant to awaken his conscience to his already-present duty.

One's understanding of common-law trial by ordeal, trial by battle, and oath hurling enhances one's common-law understanding of oaths. Traditional common law recognizes ultimate authority above the state: divine standards remain above any contrary pronouncement of the government or even the Jury. Early England recognized the right of the one convicted of a crime in man's court to appeal his conviction to God by two processes: trial by ordeal, and later, trial by battle. Before the Norman Conquest, trial by ordeal was the Anglo-Saxons' and the Anglo-Danes' direct appeal from man's earthly judgment to the divine judgment of heaven. Administered by the Church, trial by ordeal held a strong sense of divine providence. Moreover, trial by ordeal has a biblical analogue; [1120] trial by battle does not.

Thus, the Anglo-Saxons allowed the man convicted of a crime by judges of jurors, at his discretion, a final appeal to God in trial by ordeal. After the Norman invasion, however, the party losing before the Jury (moot) held the right of appeal to trial by battle—if his accuser accepted his challenge.[1121] Both trial by ordeal and trial by battle were an appeal to God at the choice of the accused, following exhausting of human trials.

The Church administered the trial by ordeal, but because men-of-arms were familiar with combat's rules of chivalry, knights oversaw trial by battle. Thus, trial by battle disallowed the Roman Church's involvement and, consequently, the influence of her civil law. The rules of fair play in battle—such as the necessity of actual service of notice from the challenger to the challenged before forfeiture and equal access to the sword and shield of the law—became the hard and fast rules of the common-law trial. Further, though trial by battle finally gave place to

[1120] Some equate *Numbers* 5:11–31 with trial by ordeal. Daniel viewed his being caste into the lions' den a kind of trial by ordeal before men in outward proof of God's verdict of Daniel's innocence. "My God has sent His angel and has shut the lions' mouths that they have not hurt me; because before Him, innocence was found in me . . . ." *Daniel* 6:22. Lions care less for a man God has made all of backbone and gristle.

[1121] Also called *trial by wager of battle*, *trial by combat*, *wager of battle*, and *duel*, the Anglo-Saxons and Danes detested it. Since few of the population were Norman, since the victorious Normans now held nearly all the land in England, and since the Anglo-Danes detested it, trial by battle seldom occurred. Only the Normans demanded it and in almost every case, it concerned disputes over the Normans' most treasured asset: land. With the introduction of the grand assize and indictment, trial by battle became little used; in 1818—654 years after it replaced trial by ordeal—, Parliament, by formal act, abolished it.

battle by trial, trial by battle strenghthed the adversarial character of the common law and refined its forms of fair play. In battle by trial, instead of opposing parties hurling the blows of weapons, litigants tried cases by hurling oaths as certification of evidence: testimonial and real. Trials were no longer contests of arms, but contest for truth. Battle by trial was not new, but the Anglo-Saxons' tradition of law and government now strengthened it.

In the changeover from trial by battle to battle by trial, however, the use of arms gave way to an unlawful use of oaths by professional swearers. In the spirit of trial by battle, the common law called such men *oath hurlers*, oath helpers, and compurgators. For example, if party A's compurgator, by his oath, purged doubt or corruption from the oath and testimony of party A's first witness, the burden of proof shifted to party B to overcome that compurgator's testimony. In order, however, for party B to do so, and thereby regained the advantage, he must produce a compurgator that can match his swearing against party A's first compurgator's oath, overcoming it. This done, party A, to regain his lost advantage, had to obtain another compurgator to overcome the oath of the party B's first compurgator, *ad infinitum*. Thus, opposing litigants used compurgators to hurl oath in return for oath much as combatants hurl blow for blow, in an attempt to out hurl their opponent. Oath hurling was a dishonest swearing match.

The Word of God bars oath hurling by forbidding two practices: proof by confession alone and vain repetition of oaths. Because Scripture requires two witnesses to establish any *material fact*[1122] offered for proof of an accusation, mere confession of the accused is never enough to convict the accused. Further, Scripture's limitation of testimony to three witnesses to establish any particular fact cuts off the use of compurgators to pile up unending oaths. A witness is one having direct knowledge (by way of his five senses) of the fact to which he testifies. Scripture limits such witnesses to any particular fact to three in order to discourage the temptation to create allusions of popular consensus by overwhelming the Jury with multiple identical testimonies.

[1122] *See Deuteronomy* 19:15. This provision requires the testimony of at least two, but allows no more than three, witnesses to establish every *arising matter* (יקום דבר: *yacoom davar*, an unproven accusation or question of relevant fact, viz. "issue"). In 2 *Corinthians* 13:1, Paul the apostle uses '*ρημα* ('*rayma*) to denote the Hebrew phrase יקום דבר. A '*rayma* is that which is unproven. Used in the civil-law tradition, a '*rayma* is a bald accusation or an unproven count in an indictment. See generally note 1633 of this book (comparing and contrasting the Greek terms '*rayma* and *λογος: logos*).

Keeping Scripture's foregoing rules of evidence holds battle by trial in the balance of fair play. In short, it protects the due-process rights of all parties.[1123] Further, each fact necessary to prove the wrong alleged requiring two witnesses—those with personal knowledge of the truth or falsity of the fact alleged—not only bars government from never convicting the accused upon his confession alone, but also discourages government from applying undue pressure or torture to force confession. To sum up, God's Word requires two witnesses to prove any fact offered, allows three, but forbids more than three.

Jesus' exposition of God's standards forbids the use of compurgators or oath hurlers: "Do not forswear [*επιορκησεις* (*epiorkeisis*): piling oath upon oath] yourself . . . but give to the LORD your oath. And I am saying to you; you ought not swear *generally*."[1124] Jesus forbids piling up oaths because unlimited repeating of an oath (vain repetition)[1125] is empty waste, i.e., to no purpose. Note well, however, Jesus never forbids swearing—indeed, examples of righteous swearing abound in the Old and New Testaments. If sworn according to His standard, God allows the taking of oaths.[1126] Thus, Jesus' never rules out all oaths, but rather, enjoins idolatry: swearing to created things instead of the Creator of all things. To swear to a created thing demeans God's name because it uses the oath in vain.[1127] Indeed, to swear an oath to anything less than God—i.e., a created thing instead of the Creator—is to swear for naught, emptiness, and is, therefore, vanity.

[1123] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1124] *See Matthew* 5:33–34. While imprisoned in either late 1590 or early 1591, Thomas Cartwright and eight other Puritan ministers drafted a statement concerning general oaths, contending that such an oath lacked biblical sanction, violated biblical injunctions, and "put the conscience oppon the racke." LEVY, *supra* note 712, at 177, *quoting* CARTWIGHTIANA (Albert Peel & Leland H. Carlson eds., 1951). *See* Baggett v. Bullit, 377 U.S. 360 (1964).

[1125] *See Matthew* 6:7, wherein Christ prefaces His example of good and proper prayer (The LORD's Prayer) with how one ought never to pray: "And praying—you ought not make empty repetition to yourself [*βατταλογησητε: battalogasate*], as do [*ωσπερ: o-sper*] the heathen." The LORD's Prayer, beginning two verses after the forgoing admonition, stands in incomparable intelligent beauty, symmetry, and simplicity against such repetitive exercises as the rosary, found among the Brahmins, the Romans, and the Hindoos. The verb *battalogasate*, being in the middle voice, pictures the pagan, attempting, in vain, communication with another, but achieving no more than talking to himself in meaningless repetition.

[1126] *See Deuteronomy* 6:13, *Isaiah* 65:16. "Everyone that swears by Him [God]," declares David, "shall glory." *Psalm* 63:11.

[1127] Hebrew: לשוא (*la-shawa*), literally, "for nothingness." *See Exodus* 20:7.

An oath is an additional binding of one's self to a duty that one has already recognized and accepted. By the time a person decides in faith to solemnize, by oath, his loyalty back to God in response to God's faithfulness to him, he has seen his duty. Ceremonial solemnizing is meant to impress that duty deeper into his conscience. Moreover, if done before any witnesses, they may help in holding him to his duty.[1128] Every

[1128] Drafted 100 years after the Reformation had begun—when the Star Chamber's forced oath was one of the contentions that held the royalist and Parliament at war—, the *Westminster Confession of Faith* succinctly expresses the biblical teaching of oaths during a time of keen understanding sharpened by adversity of the deepest convictions:

> *Chapter XXII: Of Lawful Oaths and Vows*
>
> I. A lawful oath is part of religious worship, wherein, upon just occasion, the person swearing solemnly calls God to witness what he asserts, or promises, and to judge him according to the truth or falsehood of what he swears.
> II. The name of God only is that by which men ought to swear, and therein it is to be used with all holy fear and reverence. Therefore, to swear vainly, or rashly, by that glorious and dreadful Name; or, to swear at all by any other thing, is sinful, and to be abhorred. Yet, as in matters of weight and moment, an oath is warranted by the Word of God, under the New Testament as well as under the Old; so a lawful oath, being imposed by lawful authority, in such matters, ought to be taken.
> III. Whosoever takes an oath ought duly to consider the weightiness of so solemn an act, and therein to avouch nothing but what he is fully persuaded is the truth: neither may any man bind himself by oath to any thing but what is good and just, and what he believes so to be, and what he is able and resolved to perform. Yet it is a sin to refuse an oath touching any thing that is good and just, being imposed by lawful authority.
> IV. An oath is to be taken in the plain and common sense of the words, without equivocation, or mental reservation. It cannot oblige to sin; but in any thing not sinful, being taken, it binds to performance, although to a man's own hurt. It is not to be violated, although made to heretics, or infidels.
> V. A vow is of the like nature with a promissory oath, and ought to be made with the like religious care, and to be performed with the like faithfulness.
> VI. It is not to be made to any creature, but to God alone: and that it may be accepted, it is to be made voluntarily, out of faith, and conscience of duty, in way of thankfulness for mercy received, or for the obtaining of what we want, whereby we more strictly bind ourselves to necessary duties: or, to other things, so far and so long as they may fitly conduce thereunto.
> VII. No man may vow to do any thing forbidden in the Word of God, or what would hinder any duty therein commanded, or which is not in his own power, and for the performance whereof he has no promise of ability from God. In which respects, popish monastical vows of perpetual single life, professed poverty, and regular obedience, are so

promise, commitment, or undertaking—whether formally sworn to or not—is a self-imposed binding of one's self before God: the equivalent of an oath. Scripture's term for *oath* is *ορκους* (*orkous*), signifying the swearer's self-limitation by submitting himself into the control of another in the event he fails to keep his commitment.

The differences of opinion over the taking of oaths arise from *Matthew* 5:34. Widespread confusion concerning this verse turns upon the adverb *ολως* (*olos*), meaning universally or generally, i.e., *in a general manner*. To translate *olos* with the sense "swear not at all," gives a false and irreconcilable understanding of Scripture. To translate, instead, with the sense, "You ought not swear in a *general manner*," remains truer to the idea of *olos* and is in keeping with the rest of Scripture. The only other biblical occurrences of the adverb *olos* are 1 *Corinthians* 5:1 and 6:7. Both contexts demand the sense "general manner," which does away with the confusion some have insisted upon by the entire forbidding of oaths.

Understood in this sense, Christ enjoins the reckless practice of swearing *in a general manner* (*olos*) because to do so opens one up to general, undefined, and thus unlimited, liability. An oath is one's solemnization of, and an additional binding to, one's promise. Therefore, every ceremony—including baptism, marriage, and the LORD's Supper—is an oath. Oaths are to be taken knowingly, voluntarily, specifically, and never undiscerning or in a *general manner*. An oath is an additional binding of one's self to that which it is already one's duty to do: a sober recognition of a duty. However, because the human individual is limited, in order to enable fulfillment, he must draw the terms of his oath narrow.

Papyri discovered from the first three centuries A.D., support the use of *olos* to stress a general sense: i.e., "in this general way." *Olos* is neither a negative nor a term of precision.[1129] Thus, Christ's admonition of

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> far from being degrees of higher perfection, that they are superstitious and sinful snares, in which no Christian may entangle himself.

[1129] Of particular interest to understanding the use of *olos* in *Matthew* 5:33, is a third-century papyri reading as follows:

> *καλως ουν ποιησεις ελ[θουσ]α τω Μεσορη προ [ημα]ς ινα ολως [olos] ιδωμεν σε* (You, therefore, do well coming before us in Mesorie, so that we may *really* [*olos*: in a general, or a common and relaxed, informal setting and manner] see you).

See JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 447 (1930). Understood in this sense, Christ admonishes men not to swear in a general and undiscerning *manner*. *See* 1 *Corinthians* 11:25–30 (citing the same principle with reference

Matthew 5:34 means, "Do not swear in an causal manner . . . ." If one makes an oath, one must make it attentively, precisely, and solemnly.[1130] This understanding is also harmonious with Scripture in that the oaths it records are voluntary and formal, i.e., often accompanied by ceremony. Thus, violation of the *manner* by failing to be precise brings harsh results: to enter an oath with a casual, careless, caviler, or reckless manner is to live in danger.[1131]

Notably, 1 *Samuel* 15:22 distinguishes the oath and ceremony of animal sacrifice from obedience to God: "Hearkening [*shama*:[1132] listening carefully and obeying precisely] is a deeper quality of good [*tov*:[1133] emphasizing quality, as opposed to the appearance of outward forms] than [animal] sacrifice." Scripture is clear: animal sacrifices never have take away a person's sin and guilt and never will.[1134] Also baseless in Scripture is any notion that animal sacrifices provided some other lesser efficacy as a temporary substitute for Christ's perfect substituting atonement. Like all ceremonies God's Word mentions, animal sacrifices were voluntary acts of faith in response to God's promises, intended to confirm one's oath, promise, and loyalty. These undertakings, if done by faith in God's promises of the coming Messiah, were outward evidences

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to the LORD's Table). Participation at the LORD's Table is a solemn act, indeed an oath, because it is—as is any ceremony—an outward acceptance of, and commitment to, a duty. Therefore, Paul admonishes his readers as does the Old Testament writers, respecting ceremony: partake with sober and discernment: i.e., in a manner worthy of the gravity of the duty being acknowledged. To partake at the LORD's Table with causal indifference is to act at one's peril. *See id*. Indeed, because one must choose to partake in any ceremonial act, it is senseless to partake in an un-ceremonial manner.

[1130] *See Matthew* 5:33. In our federal courts, "before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." Fed. R. Evd. R. 603. *See generally Hebrews* 6:16 (observing that one's oath provides finality to one's testimony in the eyes of men). Because this rule demands a form of oath that will awaken the conscience, the witness must insist that he swear his oath to God, and God alone.

[1131] *See* 1 *Corinthians* 11:25–30. *Αναξιως* (*anaksee-ios*) of verse 27 is an adverb denoting the unworthy *manner* of the person approaching the LORD's Table, not the worthiness of the moral condition of the person that approaches it. Indeed, no one is worthy of this privilege. *Anasksee-ios* denotes a casual manner, out of accordance with the dignity of Christ's sacrifice. Verse 30 reveals the consequences to those approaching the LORD's Table in a manner unworthy of the privilege by failing to discern the special significance of the LORD's body. To respectfully approach the LORD's Table is to acknowledge one's unworthiness. Members of the Church of God, being unworthy, must approach the LORD's Table in a *manner* worthy (respectful) of the One declared worthy. *See Revelation* 4:11.

[1132] Hebrew: שמע.

[1133] Hebrew: טוב. By contrast, יפה (*yafah*) signifies outward appearance of good form.

[1134] *See Hebrews* 10:4, 11. Such a notion is *αδυνατον* (*adunatov*): i.e., impossible.

of God's inward justification, but were never the means of personal justification. Participation in a ceremony never has justified anyone before God and never will. Only God, by His graciousness, is able justify a person and accept that person.[1135]

No juror can bind himself, whether intentionally or unintentionally, to do wrong, i.e., unlawful. Indeed, if he does, he is under an affirmative duty to disregard his oath and to do right. Because common-law government is a government of laws and not of men, any oath claiming to bind a juror to obey the instructions or directives of a judge is lawless and without binding power.

According to Scripture, to swear an oath is to willfully entrust one's self into the hands of the person or thing to which one swears, enabling that person or thing to execute judgment against the oath taker for failure to perform the vow. For a juror to entrust himself into the hand of any other person or thing besides the God that created heaven and earth is idolatry. For this reason, God demands that one's oath taking be to Him and no other, Him and no more. Moreover, God requires that if the oath taker executes his oath by ceremony, he must do so in the *manner* proscribed by God's Word: discerningly and precisely, never swearing to an undefined obligation, i.e., generally. Thus must the juror swear to God, limiting the scope of his oath and binding himself thereto.

A juror, by his oath, binds himself to hold fast to the foregoing standards of Scripture by discerning where the parties or the court have violated these standards and giving their verdict accordingly. By so doing, he will insure justice in at least four ways. *First*, it will weaken the state's motive for coercing confessions. *Second*, it will protect the innocent from undue influence, trick, entrapment, or even torture to wrongly obtain a confession. *Third*, it will provide for conviction of the guilty, where at least two, but never more than three, witnesses testify to establish any fact necessary for conviction (a material fact). *Fourth*, it will insure fair play by preventing multiplication of witnesses aimed at creating a perception of popular will, tempting jurors to bow to superior numbers instead of discerning truth by individual independence.[1136]

[1135] *See Genesis* 15:6, *Ephesians* 2:8–9. A person's acceptance of Christ is necessary, to be sure. The crucial ingredient to salvation, however, is not that person's acceptance of Christ, but rather, God's acceptance of that person. Only God can make a person acceptable through His Son and has promised to do so for "the one willing." See generally *Revelation* 22:17, for the phrase *ο θελων* (*o thelown*). The phrase is precise: not "Any who might will" but "the one willing."

[1136] Multiplication of witnesses beyond three to prove a material fact exploits human weakness that tends to believe a fact is true because many people say it is true. Experience

§ 4.3.2
Jury Ideals

As understood from chapters thirty-nine and forty of Magna Carta, the ancient right to trial by jury provides the common law's center of gravity, holding the entire tradition in balanced orbit.[1137]

The common-law tradition demands that trial by jury be understood as a right intended to fulfill a simple yet profound need: that every person, whether of government or private powers, be limited, instance by instance, in what he is allowed to inflict upon another through government power. The common-law Jury's authority and power are potent, but focused to the case it judges. By its verdict, the Jury neither legislates for all nor even commands in single instances, but rather, only grants or withholds permission to the government—or the plaintiff through the government—to act against the defendant's life, liberty, or property. No other process, institution, or method has improved upon the Jury—drawn and empanelled aright—to limit government enforcement of a petitioner's requests.

Further, the common-law Jury are the best remedy against unreliable judges. A popular craving persists among some to strip activist judges of power by (in theory) giving more power to the people through the popular legislative will. Nevertheless, to increase legislative power at the expense of the independence of the judiciary in hopes of ending abuse of judicial power[1138] is fantasy. In short, gathering of power into a legislature's single will has proven as dangerous as any concentration of state power.

The majority will has not only proven unreliable, but more often than not, has also proven inconsonant with the character of God. Increased use of the common-law Jury, however, in confidence of the individual juror's ability, authority, and power to judge the facts as well as the law in

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has shown that all are prone to this fallacy regardless of education or social standing. See generally §§ 4.3–4.3.7 of this book (discussing the independent role and duty of the common-law juror).

[1137] For the discussion in §§ 4.3.2 and 4.3.2.3 of this book, the writer credits Lysander Spooner's analysis of Magna Carta ch. 39 in his *Essay on the Trial by Jury*.

[1138] Phrases calculated to incite political outrage against the courts include *government by judges*, *the supremacists*, *despotic courts*, and *judicial tyranny*. Such language encourages individuals to place their faith in institutions of popular will, such as the federal legislature (Congress) or the federal executive (the President).

its application,[1139] will check and even halt lawless judicial activity. To be sure, the Jury, by being masters of the facts, the application of the law to the facts, and the rendering of the verdict, are in fact, the judges of the facts and the law.

Both Magna Carta and the Constitution, using brief and simple terms, reaffirm the right to trial by jury but never describe the Jury and its use. Indeed, no explanation was necessary because trial by jury was a well-established and familial part of our tradition's consciousness. Moreover, the drafters of neither Magna Carta nor the Constitution intended a treatise detailing any matter, but intended, rather, a forceful laying bare of common-law first principles. Superior reasoning is not in view, but thesoul-felt struggle over rights close at hand, sharpened by adversity.

Nowadays, however, even those in common-law countries little understand trial by jury.[1140] Though neither Magna Carta nor the Constitution defines our right to trial by jury, Magna Carta does give elucidation to those willing to parse its language and learn its historical context. Further, the Constitution's guarantee to the right of trial by jury is a continuation of the right known from the language of Magna Carta. Thus, one can better understand the Constitution's guarantee by ruminating the language of Magna Carta:

> *'[N]ec super eum ibimus, nec super eum mittimus, nisi per legale judiciumparium suorum, vel per legem terræ*, neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that these latter words, *per legum terræ* (by the law of the land,[sic]) mean by due process of law, that is, [no judgment shall be taken] without due process of indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.[1141]

By seeing the distinctions between Magna Carta and Justinian's *Corpus Juris Civilis*, jurors will better understand their duty. For example, at the heart of Justinian's Code is the imperial will acting

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[1139] *See United States v. Gaudin* 515 U. S. 506, 514–15 (1995).

[1140] According to Charles Rounds Jr., civil-law students in Europe, from Sweden to Germany, are zealous to learn of the common-law tradition as practiced in the United States, while law schools in America, by comparison, are indifferent.

[1141] STORY, *supra* note 89, at 663.

without limit and supported by the scholastic's reasoning. By contrast, at the heart of Magna Carta is the Jury, acting by natural sense of right, granting or withholding permission for government to act against another person or his property.

Magna Carta differs from *Corpus Juris Civilis* in at least five ways. *First*, Magna Carta is an agreement between England and her King, limiting his powers; but *Corpus Juris Civilis* is the command of the state embodied in a ruler.[1142] *Second*, Magna Carta denies the Crown and its agents the power to make, judge, interpret, or apply law, and further denies the Crown unbridled power to enforce law; but *Corpus Juris Civilis* claims for the state, by its single will, the unlimited power to make, judge, interpret, apply, and enforce law. *Third*, Magna Carta entitles all persons to the common law's protection of due process (*law of the land*);[1143] but *Corpus Juris Civilis* minimizes such protections in deference to the will of the state. *Fourth*, Magna Carta chapter sixty-one entitles a tenant (a positional inferior) to repudiate his agreement with his landlord (his positional superior) if the landlord fails to uphold his end of their agreement;[1144] but *Corpus Juris Civilis* fails to recognize such reciprocal rights of contract between political inferiors and political superiors. *Fifth*, Magna Carta forbids government from levying any tax except by the taxpayers' consent through due process; but *Corpus Juris Civilis* does not limit the state's power to tax through due process. In sum, Magna Carta, by protecting relationships freely entered from state meddling reinforces freedom of association; but *Corpus Juris Civilis* protects and reinforces the will and power of the state.

Because the right to trial by jury can bar government—or any oppressor invoking the power of government—from harming or taking the life, liberty, or property of another, the common-law Jury is the most basic distinguishing principle of Magna Carta, the ideal upon which its other principles depend. In short, the Jury have the right and power to say "yes" to the powerful, or to say "no." Magna Carta chapters 39 and 40, in brief terms, present the common-law understanding of the Jury's

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[1142] Among the early Britains, the Anglo-Saxons, the Danes, and the Normans that followed, has persisted the customary ideal of the common law: where a king commands contrary to law, obedience is barred. The king's "personal government," says Churchill, "with all its latent possibilities of oppression and caprice, is not to be endured." CHURCHILL, *supra* note 62, at xvi.

[1143] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1144] See generally § 5.1.6 (discussing the common-law principle *diffidatio*).

right and power. These principles, as a matter of law, remain in force in England[1145] and in the American tradition. The Jury's role, as Magna Carta intends, remains an ideal worthy of understanding and pursuit. Time, however, has eroded the understanding and practice of the right to trial by jury and, therefore, enjoyment of freedoms. If the common-law understanding of right to trial by jury continues to erode, freedom will continue to diminish.[1146]

The ideals embodied in trial by jury will protect our freedoms because these ideals rest upon the indelible stamp imprinted in the yearning of every juror: the *ability* to recognize right and wrong, to discern between the guilty and the innocent, to judge the validity of a law and its application, and to mete out a fitting and fair verdict. Moreover, due to sin and guilt, the individual juror is at least as able—if not better able—to recognize guilt and innocence in another quicker than in himself. Thus, the juror, in spite of any unwillingness to indict himself, has proven willing, when judging between others, to lay blame where it belongs. The juror's personal guilt need never compromise his potential to discern culpability and guilt in others; if fact, his personal guilt can sharpen his discernment because personal guilt over a certain wrong heightens sensitivity in discerning that wrong in others.[1147] Moreover, due to this sensitivity, in appropriate cases, the Jury has proven willing to extend mercy to the accused.

Consider the prophet Nathan's confrontation of King David with a parable akin to the cluster of sins David had done: he had coveted, lied, stolen, done adultery, and then murdered Uriah. David's capability to discern truth in judgment and then experience moral outrage concerning the wrong doings of another remained nonetheless, sober and accurate, arising from his natural, not spiritual, discernment. Upon pondering

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[1145] Under the authority of D.P. Waley, Keeper of Manuscripts at The British Library, G.R.C. Davis notes the following conclusion of law: "Clauses [39 and 40] are still valid under the charter 1225 . . . ," the final issue of Magna Carta. *See* G.R.C. DAVIS, MAGNA CARTA 23 (1985).

[1146] By pondering Langton's choice of terms in the context of his times, Magna Carta reveals two truths: Langton's deft knowledge of the ancient right to trial by jury and how the principles this right entails apply in the present. Through the centuries, however, pressing political circumstances sometimes drove commentators to wrest from Magna Carta notions unintended by Langton and its subscribers. Thus, one best seeks the true meaning of Magna Carta from its text as understood in its context.

[1147] See *Romans* 2:1, where Paul the apostle declares that an accuser's accusation of another is proof that the accuser is guilty of the same wrong. One's indulgence in any particular sin heightens one's awareness of that sin in others. His accusation of others is evidence of his common guilt with those he accuses. In short, accusation of another is self-condemnation.

Nathan's statement, David, objective and sober—as a judge and juror need be—, thinking the case was real, straight away grasped the gravity of the wrong done, felt the outrage of a shocked conscience, put himself under oath and declared the law's penalty: "As surely as the LORD lives, that man must die."[1148] In the flesh, David applied aright the law to the facts of the case concerning the sin of another, but failed to apply it to himself. Nathan, however, applied the law to David's guilt: "You [are] the man."[1149]

Though David, slow by nature to own up to *his* guilt, it nonetheless drove him to quick, accurate, and indignant accusation toward another guilty of the same crimes. In short, the guilty one is quick to point out the same guilt in another. Thus the saying, "It takes one to know one." So also, jurors are capable of discerning and accusing the wrongful or guilty party, whether the government, the plaintiff, or the defendant. At bottom, the capability of the individual juror to discern truth in fact and culpability or guilt in law and to deliver justice or mercy depends not upon any good moral character of the juror.[1150] It depends, rather, upon his drive to seize the truth, his capacity to experience indignation or even moral outrage over another's wrongdoing, and his resolve to fix fault on another or refuse to fix it at all.

As long as the ideals of the common-law right to trial by jury—as the ancient Anglo-Saxons pursued it, as Magna Carta revealed it, and as the Constitution presumes it—flow through individual jurors, the Jury will

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[1148] 2 *Samuel* 12:5. חי־יהוה כי בן־מות (*cai-ee Yaweh key ben maweth*): "By the life of the LORD, that [man] is *the son of* [the immediate result of] death." These words are David's oath that "that man" was the direct result of death. By swearing this oath, David placed himself in the hands of the LORD to deal with him according to his error if he has misjudged. David's oath, therefore, emphasizes his confidence in his conclusion. Moreover, by it, David condemns himself.

[1149] 2 *Samuel* 12:1–15. האיש (*ha'ish*): "the man of note," that is, the one in Nathan's parable of unfavorable noteworthiness: viz., the notorious one. Being concrete compared with the romance languages, the Hebrew tongue has no express verb of being: By the letters, Nathan's Hebrew thus translates into English, "You: the man." The articular noun, *the man*, is epexegetical of the pronoun *you*, but adds even more. Some have compared Nathan's well-known words to Pontius Pilates' words of presentation of Jesus Christ, meant to satisfy the envious mob: "Behold, the man!" *John* 19:5. In both cases, say commentators, the phrase, "the man," is best understood, "the man of guilt" or *the guilty man*. Pilate, however, having already adjudged Jesus innocent, likely spoke these words in cynicism. See also *John* 18:38, wherein Pilate speaks words of tired cynicism: "What is truth?" Pilate, seeing the truth, remained powerless to obey it, bowing instead to the political expediency of the majority will.

[1150] There is none intrinsically good (*αγαθος: agathos*) but God. *See Matthew* 19:17. One common lawyer distills the Word of God on this point, "We are all criminals before God—offenders against His holy laws." STRYKER, *supra* note 48, at 273.

remain a shield for the innocent and a restraint against the lawless. By this channel, a country will ultimately restrain evil activity, whether in government or without, and by so doing, will keep its freedoms. The right to trial by jury is the common-law tradition's intended remedy against lawless state power. Rightly observed, it will stop the enforcement of unlawful acts of legislatures and unjust sentences of courts. It reposes for justice upon three ideals: that the conscience of the individual is informed aright, that God has spoken and will illuminate right and wrong to each individual, and that this gift is impressed upon the natural conscience of every person[1151] by the common grace of God.[1152]

Some, outraged at the lack of moral restraint among their countrymen, in their government, by their courts, and even in themselves, long to be agents of political change. Their methods, however, often end in little or no effect; lawlessness waxes worse, swells and dominates. Breaking the strongholds of lawless excesses require something steadier than the schemes of popular politics. Because men at their best are still men, at best, neither exchanging one politician for another, nor ridding the Bench of activist judges—regardless of the good character of the new politician or judge—will never alone return the lawless state into lawful government. To place trust in new personalities is to misplace faith because only a government of law and not of men will restore freedoms. In short, loyalty to the right standard, never trust in office holders, is the cure for lawlessness. Men are unworthy of trust, but God's Word and human law consonant with that Word is trustworthy; only under law will the Jury champion liberty. The right to trial by jury is the common-law tradition's most reliable channel for divine authority to percolate into the processes of law and government to restrain outrages of overbearing powers, whether of the state or others, seeking to manipulate government against God's dignity, against God's directives, and against the dignity of men and women.

The *state* arises where all three powers of government combine to form a single will against the law and, thus, against the governed. One

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[1151] Called *natural law* by popular habit, this name traces to the ancient Greek writers and their progeny the scholastics. It is, however, unfortunate, as applied to mankind because the phrase's terms mask the scriptural understanding of natural law. See generally § 5.1.2 of this book (discussing natural law as presented by Scripture: an ability to respond to God by discerning right from wrong).

[1152] Scripture distinguishes the common grace of God from the particular saving grace of God. The common grace of God is God's indiscriminant goodness poured out upon all humanity; but God's particular saving grace is the bolt from heaven, says Spurgeon, lifting language from 2 *Chronicles* 18:33, that smites a certain man between the joints of the harness. See generally *Matthew* 5:45, for examples of the common grace of God.

must distinguish the state from lawful government: lawful government keeps a separation of coequal powers, as set forth by Scripture and at common law, each asserting its distinct authority (jurisdiction) and power against the other. On the other hand, where the courts and the executive abrogate their duty of independency and enforce the legislator's unlawful will, government has become the state; all petitions and appeals against the state's become futile. If a government, or other powerful interest using government, perpetrates its power at pleasure, determines the command of its legislation over people without possibility of review, and forces obedience to that legislation, it will also punish all associations and discussions questioning the rightfulness of its power. A government without limits against these things is no longer government; it has become the total state.

Moreover, where government dictates to the Jury instead of the Jury holding final power over government action against a defendant, trial by jury has become trial by the state. Trial by jury has eroded into trial by the state by two interlopers into our common-law tradition: the overwhelming and lawless reach of the criminal-law industry's and the increasing appointments of judges from government careers as opposed to appointments from the private practice of law. Indeed, jury trials occur, but these sometimes fail in their purpose: protection of the individual's life, liberty, and property from injustice. For example, the trial Jury—as also the federal Grand Jury—are often passive and under the prosecutor's delusion (the executive branch) and the court's enforcement of the prosecutor's lawless wants. Worse yet, jurors are ignorant of their powers and courts refuse to inform jurors, often brooking the prosecutor's abuses. Trial by jury demands jurors that are not only the sole judges of the facts and the moral intent of the parties, but also understand their power to judge the application of the law and reach their verdict in full independence of any other. Where jurors abrogate their control of these powers to prosecutors and judges, the right to trial by jury has become matter of form only, and thus, a sham and a nullity.[1153]

[1153] The common law provides peaceful and orderly opportunities, such as the Jury, to resist lawless government, lawless legislation, and lawful legislation unlawfully applied. It is the juror's duty to hold guiltless the one accused of lawfully resisting the legislator's attempt to make criminal that, which, in the eyes of God and according to His Word, is not criminal. Government is without authority to decree behavior criminal that falls outside that which God has declared criminal or to decree lawful that which falls inside of that which God has declared to be criminal.

The common-law Jury trial is trial by the conscience of the country,[1154] rather than trial by the will of the government or the state.[1155] Anciently, common-law criminal trials were trial *per pais*: judged by the defendant's neighbors drawn from the countryside[1156] where the defendant lives. Thus, twelve jurors are to be a representative sample[1157] of their neighborhood. Chosen by lot, jurors come nearer to presenting the prevailing mind of the country, with a minimum of trouble and cost, as has ever been worked out. Trial by accord of twelve jurors bars government from enforcing any legislation or exercising any power except that to which the country consents. In such a trial, those of the country determine their freedoms against the government, instead of the government determining raw power over those of the country.

The common-law tradition recognizes the Jury as the only and final judges of the facts of a case: jurors must decide what happened; the Jury's authority over the facts of a case is exclusive and without appeal. The common-law tradition takes a further step into shadowy edge of the

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[1154] After the Norman Conquest of 1066, the courts called the Anglo-Saxons' trial by jury trial *per pais* (pronounced *per pays*): trial by the country. In those early days and yet today in common-law countries, the courts required the party wanting trial by jury to demand the right in his complaint or first response to a complaint. For example, to avail himself of his right to jury trial, the plaintiff was required to conclude his pleading with such words as, "and this the plaintiff prays may be enquired of by the country" or "and of this he puts himself upon the country." The English called such words a *conclusion to the country*; the plaintiff's act of demanding trial by jury by such words they called *going to the country*.

Nowadays, though the words have changed, the principle remains: in common-law countries, the plaintiff or defendant desiring trial by jury must include the words *Jury trial demanded* at the beginning or the ending of his complaint or answer, or in both places.

[1155] True government comprises only those acts of public officials consonant with Scripture. Such government will respect every person's rights. Where government acts contrary to God's Word written, it forfeits authority and legitimacy as government and has become the *state*. Thus, the Supreme Court has held, "[A]n unconstitutional act [legislation] is not law; it confers no rights; it imposes no duties . . . It is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425 (1886).

[1156] Often expressed as trial by one's country, common-law trial by jury is trial by those residing in the *countryside* surrounding the parties to the litigation, depending upon the jurisdiction of the court: i.e., the manor village, the hundred, or the county. True jurors are the parties' neighbors. Today in common-law countries, jurors are still drawn from the geographic jurisdiction of the court: the judicial district, whether a lone county or contiguous counties.

[1157] One must distinguish *representative samples* (jurors) from *representatives*, such as a lawyer or an elected official. The juror is agent of no man but bound only to the law, as guided by his conscience and innate ability to discern right from wrong. A person specifically, and specially, chooses his lawyer and makes his choice for legislator to represent him instead of other contenders. A representative is one chosen with intelligent consideration; representative samples, however, are those drawn by lot from among a group of others. The common law intends the juror to be a representative sample of the country, never any one's representative.

twilight where tyrants like to lurk: the gloaming between raw power's unauthorized—but apparent—authority and true authority. In order to counter the state when it presses its power without right, the common law refuses to allow punishment of jurors who enter no-man's land at the law's edge, vetoing unlawful laws and the unlawful application of otherwise lawful laws.[1158]

The power of the common-law Jury to pronounce guilt or innocence without explanation, even when appearing contrary to the facts or when inconsistent with other parts of its verdict, shows the common-law Jury's power to disregard the law and the instructions of the court. Though lawyers and judges bear a duty to instruct, explain, elucidate, and expound the applicable law as they understand it, each juror is duty bound to discern these for himself. If the Jury are dissatisfied with the court's and the lawyer's explanations—i.e., if the law and its application remain unclear to them—, the common law empowers the Jury to veto the law as applied to the case they are judging, regardless of the facts, logic, or any other consideration, without fear of government retribution. "[T]he Jury," declares the Supreme Court, "has the power to bring in a verdict in the teeth of both law and facts."[1159] The juror's power and absolute freedom from fear of retribution is indispensable to our common-law freedoms, without which the Jury are meaningless.[1160]

[1158] Although Samuel Rutherford had followed Paul the apostle in distinguishing *authority* from *power*, the first recognition of this distinction in the common-law courts comes from the findings of Lord Mansfield. *See* Rex v. Shipley, How. St. Tr. 21:847 (1785). See generally app. 18 of this book (discussing the distinction between authority and power in the context of *Romans* 13:1–2). Lord Mansfield admitted that the common-law Jury's exercise of power in setting aside the law in egregious cases is admirable, yet this power of the Jury was without the dignity of the Jury's right. In dissent, Justice Willis affirmed the Jury's right to judge the law: "I believe no man will venture to say they [the Jury] have not the power, but I mean expressly to say they have the right . . . [,] as without this restraint the subject in bad times would have no security for his life, liberty, or property." *Id.*

The Supreme Court recognizes the distinction between Jury power and authority, observing that jurors sometimes "acquit out of compassion or compromise or because of their assumption of a *power* which they had no *right* to exercise, but to which they were disposed through lenity." Standefer v. United States, 447 U.S. 10, 22 (1980) (emphasis added). *See also* Sparf v. United States, 156 U.S. 51, 133–34 (1895). The juror's power, however, without authority, is usurpation and, therefore, lawlessness: the only conclusion possible from the holding of Lord Mansfield and the Supreme Court. By contrast, Justice Willis's position is sensible: if jurors rightly have the power to set aside the law, they have the right; if jurors have not the right, courts must never enforce the Jury's verdict. Because our courts have followed Lord Mansfield's theory, life, liberty, and property are less secure.

[1159] Horning v. District of Columbia, 254 U.S. 135; 41 S.Ct. 53, 65 L.Ed. 185 (1920).

[1160] In tax cases, fear of retribution injects fear into the court at every level. The taxing power has proven able, and willing, to obtain Grand Jury indictments not only against jurors, their friends, and families, but also against judges, lawyers, witnesses, and their families.

Because the common-law tradition recognizes that jurors hold the raw power to set aside and ignore the law, and the instructions of the court, some argue that a judge's instructions to the Jury of its power to judge the law is akin to a police officer telling a motorist that he has the power, but not the authority, to speed. This analogy, however, is too thin for consideration because if the motorist exercised his power by speeding, the officer has authority to arrest him and the government to prosecute, fine, or even jail him. By contrast, if the juror exercises his power by refusing to enforce the law as instructed by the judge, the state is without authority to threaten, intimidate, arrest, or prosecute him.

Common-law trial by jury, understood in light of *Romans* 2:14–15 and practiced in its ancient form, is the gravitational center of our common-law freedoms. The Jury's simple and unexplained veto of the law and its judge-instructed application, case by case, is the steady and sure-footed defense against the tyranny of over-zealous prosecutors, the domination of dictators, the malignancy of political correctness, the mania of majorities, and the arrogation, ignorance, and misapplied knowledge of priests, scholars, legislators, and judges. Over time, the calculus of Jury verdicts concerning government's intended application of any legislation arises from a random sampling of a country's individual, objective, and God-given sense of justice and thus is a reliable revealer of true right.

Jury trial is not only consonant with Scripture, but also, Scripture recommends it for a channel of God's will to flow through the natural sense of jurors,[1161] providing the surest method of uncovering truth. By its veto or permission, the Jury never act[1162] against any individual but, rather, allow, limit, or entirely forbid government action against the individual.[1163] Where a party claims the right to trial by jury, the common

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[1161] See generally § 4.3 (expounding 1 *Corinthians* 6:1–6).

[1162] In keeping with the juror's ideal of individual independence of judgment and in derogation of any majority principle, the English language uses the singular form *Jury* to be a plural concept in severalty: *e.g.*, individual jurymen judging independently one from another. Though the English language has strayed from this concept, the term "Jury" is a plural noun and therefore takes a plural verb. For example, "The Jury *is* empanelled," is incorrect; "The Jury *are* empanelled," is correct. Mortimer, therefore, writes, "[S]he was the sort of witness the Jury *love* . . . ." JOHN MORTIMER, THE SECOND RUMPOLE OMNIBUS 220 (1987) (emphasis added). An English barrister-turned-writer, Mortimer provides a view of the Old Bailey, England's central criminal court where he practiced, from the eyes of counsel for the defense. *See also*, *e.g.*, FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 116 (1986) (1903): "[T]he jury rather like his straightforwardness."

[1163] The common law clothes the juror with authority to say *yes* or to say *no* to the government. *See generally* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852) (expounding the Latin text of Magna Carta chs. 39 and 40 in light of its historical context,

law allows government to act in derogation of an individual's life, liberty, or property only at the allowance of the Jury, empanelled according to the course of the common law, and comprising twelve *peers*[1164] of the parties or, if a criminal trial, the defendant. The common-law Jury are the individual's buffer between the state and his life, liberty, and property. Simply put, the state is without authority to act against any person absent the permission of the Jury.

The danger is not only that domineering government power will overcome the independence of the juror—his autonomy and freedom of independent judgment—but also, of even greater danger, is the juror's love of dependence upon those claiming to relieve him of his responsibility to think and stand alone.[1165] Such is the lesson of Scripture

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grammar, and vocabulary). The civil lawyer objects, saying that one is hard pressed to uncover an argument for entrusting to "twelve ignorant men . . . the power to judge the law, while justices learned in the law should be compelled to sit by, and see the law decided erroneously." *Id.* at 123–24. Spooner answers:

> One answer to this objection is, that the powers of juries are not granted to them on the supposition that they know the law better than the justices; but on the ground that the justices are untrustworthy [and] fond of power and authority . . . The powers of juries, therefore, not only place a curb on the powers of legislators and judges, but imply also an imputation on their integrity and trustworthiness; and *these* are the reasons why legislators and judges have formally entertained the intensest hatred of juries, and, so fast as they could do without alarming the people for their liberties, have, by indirection, denied, undermined, and practically destroyed their power.

Id. (emphasis in original). The Jury is a court, seeking fellowship of conscience on a single matter, by trying the facts and testing the application of the law to those facts. The common law entitles—nay, indeed requires—each juror to bring the gathering of his unique knowledge, experience, and understanding to bear upon his decision.

[1164] *See* MAGNA CARTA chs. 39, 40. The earlier common law understood jurors to be judges, titling them *Pares Curiae* (Peers of the Court, i.e., "Peers serving as the court"). *Pares* is from the Latin *parium* and *par*, meaning equal, a match: viz., English, "pair," those corresponding. In the common-law tradition of jury trials, therefore, peers are those belonging together. A person's peers are those corresponding to him because they share his experience and, therefore, understand his circumstances. The common law, therefore, allows only one's peers to give final affirmation to another's accusers. Thus, government is never to bring force against the life, liberty, or property of any person, "except according to the judgment of his peers." (*nisi per legale judicium parium suorum vel*). *Id.* at ch. 39.

[1165] In common-law countries, the court draws the Jury pool from which jurors are then drawn; these jurors are then sworn to protect their neighbors' rights to their lives, liberties, and property. If one follows Postman's conclusion, the integrity of those in the Jury pool stands neither foremost in danger of an external oppressor, such as Islamic terrorists, nor in danger that the truth will be concealed from them, but rather, that a sea of irrelevance has overwhelmed their ability to recognize truth:

> What Orwell feared were those who would ban books. What Huxley

and history. The juror, then, must make independent judgment on the facts as rendered up though the processes of the common-law trial.[1166]

The common-law Jury are a court of conscience; if all twelve jurors fail in this role, it is because their individual consciences are uninformed, wrongly informed, or rightly informed but lack conviction. The Jury's worth rests upon the belief that out of twelve randomly drawn persons, at least one, seeing the truth, will defy all intimidation from other jurors, the judge, the prosecutor, bureaucrats, powerful parties of interests, and public opinion. If such persons of discernment and conviction, gravel and grit grow scarce, we must blame ourselves and work to build such pluck into ourselves and others using the only available means: by informing our consciences and the consciences of others with God's written Word, encouraging total trust upon God through familiarity with that Word.[1167]

> feared was that there would be no reason to ban a book, for there would be no one who wanted to read one. Orwell feared those who would deprive us of information. Huxley feared those who would give us so much that we would be reduced to passivity and egoism. Orwell feared that the truth would be concealed from us. Huxley feared the truth would be drowned in a sea of irrelevance. Orwell feared we would become a captive culture. Huxley feared we would become a trivial culture, preoccupied with some equivalent of the feelies, the orgy porgy, and the centrifugal bumblepuppy.

NEIL POSTMAN, AMUSING OURSELVES TO DEATH *from* Foreword (1981).

Popular culture has become both captive and frivolous: trapped in triviality and captive to the lusts of the flesh, the eyes, and the pride of life. Postman continues, citing the failure of the libertarians' utopian view of man to take into account man's undiscerning weakness:

> As Huxley remarked in *Brave New World Revisited,* the civil libertarians and rationalists who are ever on the alert to oppose tyranny "failed to take into account man's almost infinite appetite for distractions." In *1984,* Huxley added, people are controlled by inflicting pain. In *Brave New World,* they are controlled by inflicting pleasure. In short, Orwell feared that what we hate will ruin us. Huxley feared that what we love will ruin us.

Postman's book, *Amusing Ourselves to Death*, "is about the possibility that Huxley, not Orwell, was right." *Id.* The battle for truth remains in the discipline of mind.

[1166] In a common-law trial, the Jury discovers, first, the facts and, second, the law of the case. By discerning the truth of the matter before the court, each juror exercises his divinely bestowed natural ability to discern right from wrong, according to the awakening of his conscience to the task.

[1167] Total dependence on God is faith in the character of God. "Biblical faith," says Woodrow Kroll, "is one's confidence in the good character of God that fosters trust and hope, even when one's circumstances foster doubt and despair."

Indeed, the failing of a juror in his duty is often attributable to the juror's ignorance of his duty:[1168] he cannot follow a duty of which he is unaware. The cure for such ignorance is the imparting of knowledge concerning the duties of jurors by both those concerned persons outside the courts and by judges and lawyers within the courts. Even in view of the failings of jurors, the Jury remains the best buffer between the accused and the state. Without the Jury, their remains no defenders of practical sense against the tendency of scholars, legislators, lawyers, and judges to use scholastic prestige and abstract, undiscerning, capricious notions of right and wrong to supplant truth.

[1168] Having defended clients being tried before the Jury forced to deliberate under untold pages of complex instructions that neither the lawyers nor the judge understood, the writer is under no delusions: our procedure, in practice, suffers flaws; Jury verdicts are unpredictable. Following the Jury's verdict respecting one client, the writer recalls one juror, a truck driver, with tears welling in his eyes, telling why the Jury remained out for two weeks. Though he finally buckled under the pressure of the other eleven jurors, he held out for days. Though jurors sometimes give in, justice need never depend upon the majority of the Jury, but duty demands that it depend upon each juror's independence, conviction, and hardiness.

In another case then pending before the Grand Jury, the author's client determined to protect his innocence behind the shield of the Fifth Amendment. The writer later learned that the United States attorney, unsure of the Grand Jury's willingness to indict, obtained an indictment by altering evidence the writer had gathered in exoneration of his client. The answer to such injustice is not to end the Grand Jury as a common-law institution, but instead, to teach the individual juror of his lawful independence, authority, and power; then to invigorate his courage by inculcating the Word of God and its promises into his conscience. Truth will then grip his will.

The elitist's rationale for keeping the truth of the law—such as the lawful authority and powers of the juror—in the exclusive possession of an elite class of scholars, is the civil-law attitude that those untrained in the law cannot possess the law without destroying it. This elitist attitude, however, fails to acknowledge two facts: true law is consonant with God's way pointed out; as such, it will neither change, nor will it fail to change, the person possessed by it. Such elitism was the attitude of the self-proclaimed Jewish religious conservatives of Jesus' day. See generally *John* 7:48–49, where the Jewish rabbis contrasted themselves (*αλλα: alla*) with "this mass of rabble—the one [that] can not know the law—being *cursed* [*επικαταρατοι: epikataratoi*, irreversibly doomed]. *See John* 7:49. See generally 2 H.L. STRUCK AND B.A. BILLERBECK, KOMMENTAR ZUM NEUEN TESTAMENT AUS TALMUD UND MIDRASCH 494–519 (Munich: C.H. Beck, 1965), for the Jewish rabbis' disdain toward those they were responsible to teach the law. *Cited in* LINGUISTIC KEY TO THE GREEK NEW TESTAMENT 323 (Fritz Rienecker trans., Cleon Rogers ed., Zondervan 1982), *originally published as* SPRACHLICHER SCHLUESSEL ZUM GRIECHISCHEN NEUEN TESTAMENT (Brunnen-Verlag, Gissen 1970).

If a proposed expression of law is unlawful because it is inconsonant with God's Word, the court ought to strike out the offending part or abandon it altogether. In such cases, a juror's duty requires that he nullify that which is a wrongful application of law or is no law at all. History teaches that the just application of the law is safe only as jurors serve as judges over the application of the legislator's legislation, regardless of the branch of government from which such legislation comes.

§ 4.3.2.1
Juror Independence

Because the Jury ought never operate according to any majority principle, each juror is duty bound to ponder and judge independent of the other eleven. Significantly, in the Corinthian epistles Paul not only gives certain sanction to the Jury—while assuming his readers' knowledge of the common-law Jury—,[1169] but also belabors the duty and ability of the individual juror to discern and exercise judgment independent of all other men. In both epistles, Paul's tone is far from imperial, declining at times to give commands for a specific wrong he addresses, because God had not given any on-point command for the matter. Paul instead provides principles coupled with his opinion for guidance, all intended to encourage sound personal discernment and action. For example, Paul writes, "But to the rest *I* speak, not the LORD";[1170] and, "As God has distributed to every man, as the Lord has called each one, let him so walk."[1171]

The Corinthian epistles concern the necessity of each one exercising independent mind and judgment as concerns all things, including serving as a juror and not trusting leaders to make one's moral decisions. The Corinthians were taking their disputes before Rome's tribunals of dependent judges. Paul the apostle, therefore, exhorts the Corinthians to empanel jurors to exercise independent judgment, calling them *judges*. In addition, the Corinthians had divided themselves over the misguided question of which church leader (Paul or Apollos) they were to look to for instruction.[1172] Paul, therefore, seeks to drive the Corinthian believers to

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[1169] See generally § 4.3 of this book, discussing the common-law Jury as set forth in 1 *Corinthians* 6:1–6.

[1170] 1 *Corinthians* 7:12.

[1171] 1 *Corinthians* 7:17. Paul's purpose in writing the epistles to the Corinthians was to bring God's order to the Corinthians' chaos. Knowing this purpose will focus the reader on informing his conscience aright with the Word of God and exercising his independent judgment, instead of attaching himself to some other mortal—as did the Corinthians with Paul and Apollos—believed smarter than himself, to make decisions for him. In addition, it will keep the reader from falling prey to Bible teachers bent on giving their interpretation and application of hard questions as though they had authority to command the conscience of another. For example, 1 *Corinthians* 8:1–13, calls not for church leaders to command church members, but rather for all to learn the discipline of right exercise of personal discernment and application of biblical principles, and respect for the conviction of conscience in others. Knowing the purpose of these epistles, all ought to focus on informing the conscience aright and encouraging the principles of discipline that enable sound individual discernment and application, independent of any other mere man, but in direct dependence upon God. *See also Hebrews* 5:12–14, *Colossians* 2:16.

[1172] *See* 1 *Corinthians* 1:11–12.

Scripture's first principles, from which each one must then make independent and sound judgment in determining one's behavior.[1173]

The real and lasting remedy for ongoing evil doings among a people (lawlessness) is never the command of an imperial government or demagogue, but rather, is always the overcoming of mental lethargy by knowledge of God's Word written followed by keen discernment and bold action, quickened by the Holy Spirit, in response to that Word. In his second epistle to the Corinthians, Paul continues his exhortation to learn independent discernment.[1174] The necessary foundation of independent judgment is the first principles of God's Word.[1175] Only by exercising such independent judgment and then acting on it will one whet his senses to an edge keen enough "for judging of both good and evil."[1176]

§ 4.3.2.2
Acts Discretionary & Administrative

Common law distinguishes three categories of action: arbitrary, discretionary, and administrative. *Arbitrary* acts are those that the actor determines according to his preference, prejudice, or even reason; rather than according to fixed rules, procedures, or laws. Being purely subjective and capricious, arbitrary acts are lawless and, as such, are repugnant to the common-law tradition.

The common law distinguishes arbitrary acts from *discretionary* acts. Arbitrary acts are unbounded by any ascertainable limit, whether subjective or objective; discretionary acts, on the other hand, are bounded by the actor's conscience, however informed: sufficiently or insufficiently, rightly or wrongly. In short, arbitrary acts lack limitations.

[1173] *See, e.g.*, 1 *Corinthians* 2:15.

[1174] *See* 2 *Corinthians* 3:17, 8:8.

[1175] *See Hebrews* 5:12: *της αρθχης των λογιων του θεου.* Also translated aright, "the first principles of the oracles of God" (*των λογιων: ton logiown*), stressing that God's Word written is the record of His utterances.

[1176] *Hebrews* 5:12–14. The first-century churchman, hearing these verses read aloud, doubtless noted the writer did not write *αγαθου τε και πονηπου* (*agathou te kai ponayrou*), but rather, *καλου τε και κακου* (*kalou te kai kakou*). Though both phrases allow same English translation, the former speaks of the inward quality of good and evil; the latter stresses outward appearance. Thus, the writer answers the question, how does one discern the inward intent of good from evil, when all he can see is the outward form? Answer: only by reason of use can one sharpen one's senses (*γεγυμνασμενα*: completely trained, i.e., perfected) to the task. In short, the first principles of God's Word are the foundation and the practice of these principles perfects them.

One's conscience, however, guides one's discretionary acts aright only if one chooses to use his conscience and only if it is informed aright.

Put another way, arbitrary acts are without discernment and, thus, always lawless; discretionary acts are lawful only as these are limited, at the least, by the actor's conscience, rightly informed. Sometimes the law expresses the limits of discretion, sometimes it does not. In all cases, however, any discretion the law allows has limits. Thus, discretion is either broad or narrow; violating its bounds, the common law calls *abuse of discretion*. Thus, arbitrary acts are subjective and unbound: subject only to the will of the actor. Discretionary acts are bound by objective and general, yet fixed, principles made subjective by informing one's conscience with these principles: i.e., subject to the motivation of the actor's conscience—the actor's desire for satisfaction by doing right or the his desire to avoid the guilt resulting from violation of his conscience. Therefore, arbitrary acts are impermissible; discretionary acts are permissible, but only where precise guidance of good authority is unavailable.

Both eternal life according to the Scriptures and the life of the common-law tradition require the training of one's senses to rightly exercise discretion. Because discretionary acts are conscience dependent, it is necessary that the Church work to rightly inform the consciences of individuals with the Word of God, which are the first principles of the common law. A wrongly informed conscience will produce a wrong result; a seared conscience will allow one's intended discretion to become arbitrary.[1177] Freedom presumes consciences informed aright. Indeed, one's freedom is impossible unless one's conscience is informed aright. Further, practical freedom from the courts requires wise discretion of each juror.

Finally, *administrative acts* are lawful only as the actor confines his actions to the strictures of regulations. Administrative acts, therefore, are subject to the limits of precise regulations, albeit the regulations themselves often being arbitrary. The common-law tradition, therefore, bars government clerks (administrative bureaucrats) from exercising discretion.

The practical purpose of the Christian life is a deft knack, made habitual and sharpened by disciplined use, to exercise discretion in accord with divine revelation: both Scripture and nature.[1178] Christian

[1177] *See* 1 *Timothy* 4:2.
[1178] *See Hebrews* 6:14.

liberty—the only true freedom—entails the right exercise of discretion, which requires a conscience informed with right knowledge. Intelligent discretion from a conscience rightly informed is the remedy for lawlessness among a people.[1179]

§ 4.3.2.3
Channel of Divine Justice & Mercy

A celebrated French writer, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England must perish, should have recollected, that Rome, Sparta, and Carthage, at that time, when their liberties were lost, were strangers to trial by jury.[1180]

In Scripture, *justice* is the act of meting out God's judgment, fitting to just deserts—no more, no less.[1181] Christ confirms the entire Old Testament standard as just,[1182] including its provision requiring that sentence for a given crime commiserates with the degree of the crime.[1183] Scripture provides correction to all—including magistrates—, forbidding delivery and execution of judgment out of vengeance, economic advantage, callous disregard for justice, or fear of disapproval for being politically incorrect. Justice, therefore, also excludes the excesses stemming from personal desire or vengeance, such as cruel and unusual punishment and torture.

Mercy, on the other hand, tempers justice by acknowledging that man judges in varying degrees of ignorance, misinformation, and bias. To be distinguished from justice, mercy is the forbearing of judgment that the law ought to mete out due to mitigating facts such as human ignorance, lack of competent evidence, procedural defects, or lack of due process. Judgment, then, is that which a court justifiably inflicts upon doers of wrong; mercy is that which a court refrains from doing, even though the law justifies the action. In criminal cases, Holy Writ binds the court to

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[1179] *See generally* 1 *Corinthians*, 2 *Corinthians* (providing examples of a people in need of the exercise of discretion in judgment in disputes between its members). See also generally § 4.3 of this book (expositing 1 *Corinthians* 6:3–4 and discussing the competence of the *least-esteemed* among the Corinthian assembly to sit as a panel in judgment concerning disputes between members of the assembly).

[1180] STORY, *supra* note 89, at 658, *quoting* BLACKSTONE (n.ed. specified). Common-law trial by jury provides the orb within which the common-law tradition must function in order to maintain liberty. To maintain the right to trial by jury means to maintain all its common-law properties.

[1181] *See Deuteronomy* 19:21.

[1182] *See Matthew* 5:17–19.

[1183] *See Matthew* 5:38.

resolve all doubts in mercy's favor. To do so is in keeping with the common-law principle demanding that a defendant remains innocent until proven guilty beyond any reasonable doubt: any doubt of innocence arising beyond first glance of the accusation that is within reason, viz., reasonable.[1184]

The worth of right to trial by jury is beyond question in criminal cases, where life or liberty hangs in the balance. The liberty of property and rights in non-criminal cases, however, is of great import also. In fact, the whole common-law tradition of freedom rests squarely upon individual rights of property. Indeed, rights are property.[1185] In capital cases, where the life of the accused is in question, we entrust the answer only to the Jury. If our law puts a matter of such gravity only upon one's neighbors, why are any unwilling to entrust lesser questions of rights and property to the Jury? Indeed, says Paul the apostle, in disputes of mere money and property, give the dispute to the Jury: empanel the least esteemed among you as judges of the matter.[1186]

Use of the common-law Jury rightly reaches to all matters of rights and relationships, criminal and non-criminal. Our only other option is a state-paid judge to whom honor is due, but who remains, nonetheless, says the Supreme Court, "a lone employee of the state." Thus, in all cases in which the judge's employer (the state) has an interest, the judge is conflicted and, therefore, as a matter of law, biased. Only the Jury is fit to judge such cases. Even one juror of twelve having an interest in the case ruins the Jury's verdict—all the more the judge having an interest.

As judges more and more come to the bench from paid government positions, with little or no private practice under their belts, the more dependent courts will become, i.e., loyal to government instead of loyal to the law. To control a judge is to control the final interpretation of the law; it is to have the power of lawgiver. Thus, judges are targets of control of the powerful. As long as men seek in restless fear to dominate each other instead of the land and its resources, the Jury will more than ever remain of inestimable worth to our freedoms. Bottom line: the powerful, in and out of government, have difficulty controlling jurors drawn and empanelled within minutes of a trial.

[1184] See generally § 5.1.10.3 of this book (defining guilt beyond a reasonable doubt as a standard of proof). For the discussion *in* §§ 4.3.2 and 4.3.2.3 of this book, the writer credits Lysander Spooner's analysis of Magna Carta ch. 39, in his *Essay on the Trial by Jury*.

[1185] Rights are property. Some rights, such as contract rights, are alienable; fundamental rights are inalienable.

[1186] See § 4.3 of this book (expounding and discussing the reference of 1 *Corinthians* 6:1–6 to the Jury).

In the common-law tradition, as the eternal standards of law arise among customs, men recognize and refine them by each usage, demanding justice—each person from another according to their relationship. In cases of disagreement about how these apply, the Jury confirm them apart from any legislative action of the government.[1187] Juries, by their many findings over time concerning any given issue[1188] of law or fact, refine those usages and customs, ordain rights and duties, secure public safety, defend liberty, teach reverence and obedience, and establish justice. These things secured, Providence grants opportunity to develop strength of character, pursue clean and honest lives, and render diligent and faithful service to others, all in loyal obedience to true laws. Human legislation enacted in the utopian ideal of the civil-law tradition is an arbitrary meddling in the foregoing process.

The common-law Jury are neither an agency of government nor an institution of majority rule. The Jury's design demands that it stand independent of the state and of majorities. Its foremost purpose is to find and deliver truth, not confirm the state's will, the popular will, or even the Jury's majority will. Neither the authority nor the use of jurors as protectors of freedom reposes on any majority principle, but upon the independent mind and judgment of each juror operating outside of the state's legislative will, popular opinion, and the Jury's majority. For each juror to fulfill this duty, he must function at arm's length from the state, from the judge, and from the other jurors.

Recognizing the weakness inborn in the individual juror to cower in the face of state enforcement power of its legislative will or the intimidation of popular opinion, to fall prey to political correctness or direct pressure from a majority of jurors, the common law provides additional safeguards. Thus, the common law relies for justice upon the likelihood that a lone juror from among the twelve is inspired, at the crucial moment, to rise above his mundane weaknesses and deny the majority will. The single juror holds this right and power in his hands, enabling him to protect his neighbor's life, liberty, and property.

The Jury are the common law's final[1189] guardian of natural justice because according to Scripture[1190] all of mankind, Christian and heathen,

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[1187] In addition, our organic documents, such as the Declaration of Independence and Constitution, have memorialized the common-law limits of government power.

[1188] As used in the courts, an *issue* is a matter in dispute between two parties or between more than two parties.

[1189] Absent clear abuse of discretion or lack of due process, appellate court's are without authority to review the Jury's verdict in criminal cases. *See* U.S. CONST. amend. V. The right

if allowed access to enough relevant facts, can discern right from wrong in any particular case, especially concerning the relationships of others. Thus, the parties before the court seek to motivate the juror to grasp his duty to judge the truth of facts and engage his God-given capability to discern the validity of the law in its application. In each case, the Jury has power to rein in the government. Without pervasive and right use of the Jury in the common-law courts, natural justice, as set forth by Scripture, will fail.[1191]

The civil law, attempting to anticipate every contingency, seeks certainty by ruthless pursuit of all-embracing legislative detail. By contrast, through the Jury, natural law—far from being uncertain when compared with statutory law—gives steadfast certainty to our statutory and constitutional law. From legislators come divergent meanings to the words and phrases of statutes in their bearing upon men's rights and relationships; from accumulated Jury findings emerges the rule of interpretation for determining which of the legislators' various and even opposite meanings are true and right. Over time, the calculus of Jury verdicts arising of out of the country on any particular issue magnifies the distinction between right and wrong respecting that issue.

The trend of Jury verdicts on a given point have proven better able to reveal the true standard than has legislation handed down in a single act from the academic towers of philosophers-turned-authors of civil-law codes. Through the Jury in real cases, the common-law tradition ever emerges in purer refinement; while the scholar-legislator, by his academic method, delivers the civil-law tradition by a single legislative act called a code and strives to maintain the bluntness of its status quo. By contrast, common-law jurors allow progress by testing fresh applications of timeless principles in new circumstances.

The common-law and the civil-law traditions present differing remedies for three threats to liberty: a lawless state, lawless judges, and lawless individuals. The remedy of the common law is the Jury drawn at random from among those living near, and thus with personal knowledge

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to not stand trial twice before the Jury (the right against double jeopardy) in a criminal case "is secured by the common law." STORY, *supra* note 89, at 662.

[1190] *See Romans* 2:14–15. See generally § 5.1.2 of this book (discussing every man's power to sense justice: the innate capability of human kind to discern right from wrong).

[1191] *See id.* Paul's purpose in *Romans* 2:14–15 is to prove the guilt of any person claiming for his defense a lack of knowledge of right and wrong, i.e., law. Acting as prosecutor, Paul proves the ability of every person to attain such knowledge by his readiness to do two things: to offend others by accurate accusation of their wrongdoing and to defend himself by making effective legal arguments, justifying his behavior.

of, the litigants; the civil law's remedy is more exertion of impersonal state power. Thus, the common law has taken the power of judgment away from government and placed the authority and power to judge the facts, apply the law, and give the verdict in twelve persons—not a majority of representatives, but a representative sampling of the country.

The common-law Jury and the processes it demands as a remedy for lawlessness from any source, however, is effective only as we pursue the practice of its ideals in their purity. Over the centuries, by increasingly trusting intellectuals, legislators, and executives, by bits and parts, common-law countries have abandoned the ideal of trial by jury. Scripture gives no warrant to mankind in general, or to God's people in particular, to entrust what God has entrusted to each individual—viz., discernment over life, liberty, and property—to any class of intellectual elitists, whether priests, scholars, politicians, or judges.

Scripture is clear: God has chosen to work through individuals and each individual's responsibility for the stewardship of life, liberty, and property is direct to God. Further, each person is responsible to administer these in accord with God's Word and to protect and preserve the freedom of others to fulfill this same responsibility according to his conscience, as God gives light. Moreover, Christian or not, the Creator has endowed each person with the ability to discover and discern God's law in its particular applications—right from wrong—and to stand in judgment of the facts, the application of the law, or whether to apply it at all.[1192] By insistence upon trial by jury, the common-law tradition recognizes the innate ability and responsibility of jurors to stop lawlessness of the powerful, in and out of government.

Power comparable to that of captains of ships at sea is available to judges in courtrooms, giving opportunity for overreaching and abuse. The common-law tradition provides necessary *checks* on state power intended to impede, reign in, cause hesitation, and slow down the governmental and judicial processes: legislative limitations on the courts' jurisdiction, legislative impeachment of judges, and legislative or executive resistance to court opinions.[1193] The ultimate remedy, however, for judicial overreaching is the common-law Jury.

[1192] Individual and direct responsibility before God is the inescapable demand of both Scripture and the common-law tradition. Each person will answer for himself. "The soul that sins," declares Ezekiel, "it [he] shall die." *Ezekiel* 18:4.

[1193] See § 5.3.5.1 of this book (arguing that it is unwise to give the legislature power over the courts to remedy lawless courts).

To those using the cunning devices of tyranny, these checks are mere inconveniences that will only stop tyranny in one branch of government by transferring it to another, but not disposing of its growth altogether. Such was the outcome of the English Parliament's war with the royalists: in Parliament's struggle to wrest god-like powers from the Crown, Parliament transferred those powers to itself, making Parliament absolute. The common-law Grand Jury and Petit Jury, however, stand apart from government and, when justified, in judgment upon government.[1194]

§ 4.3.2.4
Justice, Mercy & Grace

[The common law] has a single guiding rule, the "golden rule," a negative rule, "Don't do something to someone that you don't want to have visited on yourself, either directly or through the agency of a government." It has suffered much at the hands of legislators . . . .[1195]

Alfred's *Laws* included words sounding akin to the Golden Rule: "Do not unto others what you will not have others do unto you." Alfred's words, however, are passive, but Christ puts the Golden Rule in the active

[1194] The United States Supreme Court has held that the federal Grand Jury are a kind of fourth branch of government, subject to neither the courts (judges) nor the executive (prosecutors). The courts, Congress, and the executive branch of the federal government now all attempt to assert control over rules governing the federal Grand Jury: recently, the Supreme Court has made rulings, congressional commissions have promulgated findings and rules, and the President's justice department has issued orders concerning the Grand Jury; thus, the law on the matter remains uncertain. *See generally* BRENNER & LOCKHART, FEDERAL GRAND JURY PRACTICE § 2.3 (1996) (discussing the peculiar status of the federal Grand Jury).

The Grand Jury are of ancient origin in England, but in 1933, Parliament discontinued their use. In recent decades, Americans have increased the use of the federal Grand Jury. Federal courts are not to meddle with the Grand Jury, but are to serve as enforcers of Grand Jury subpoenas and as guardians of the secrecy of Grand Jury proceedings. Congress is now concerned that the original purpose of the Grand Jury—to protect the people from the state's unwarranted aggression while investigating crime—is now overthrown: the federal Grand Jury have become the primary sword of the prosecutor and are no longer a shield for the people. A reading of federal Grand Jury transcripts reveals the Grand Jury's passive dependence upon prosecuting attorneys. Congress's Hyde Commission concluded that the federal Grand Jury are prone to use as a rubber stamp for the United States attorney; with it, he "could indict a ham sandwich."

[1195] WALTER BAGEOT, THE ENGLISH CONSTITUTION 229–30 (n.p., 1867), *quoted in* Peter Landry, *Common Law: Tradition & Stare Decisis* (visited 21 Nov. 2005) <www.blupete.com> (emphasis added). The essence of legislation is to control the future by commanding persons to do or not do certain acts. Equity jurisdiction, stemming from civil law, shares this *in personam* power; equity acts against the person. Legislation, as equity, claims power to command and enjoin before judgment.

voice.[1196] Justice is a necessary pillar of a country. King Alfred likely cast this rule in the passive voice because he believed that the duty of man's courts—as is the duty of all courts of men in this age—is foremost justice, sometimes mercy, but never grace. In addition, justice is often passive, requiring no act.

For example, if one sits at home and keeps from bearing false witness or stealing from his neighbor, one has fulfilled justice toward his neighbor. That is, he has forborne doing to his neighbor that which he wants his neighbor to forbear doing to him: he has left his neighbor alone. According to King Alfred, to refrain from trespassing upon one's neighbor or his property achieves justice; Alfred was not wrong:

> King Alfred's Book of Laws, or Dooms . . . inverted the Golden Rule. Instead of "Do unto others as you would that they would do unto you," he adopted the less ambitious principle, "What ye will that other men should *not* do unto you, that do ye not to other men," with the comment, "By bearing this precept in mind a judge can do justice to all men; he needs no other law books. Let him think of himself as the plaintiff, and consider what judgment would satisfy him."[1197]

The duty of judges then in Alfred's day—as is the duty of judges in this day of man's judgment[1198]—was to penalize behavior that, falling below a recognized floor limit, fails to do justice. Behavior remaining above this floor limit excludes government's judgment and enforcement; for these innumerable lesser wrongs, human government lacks jurisdiction.[1199] Thus, unlike the court of God's judgment, human courts are of limited jurisdiction. To "do no ill to one's neighbor" is to keep one's behavior above the floor limit below that which demands government penalty.

[1196] *See Matthew* 7:12, *Luke* 6:31.

[1197] CHURCHILL, *supra* note 62, at 89.

[1198] See generally app. 31 of this book, for biblical contrast and comparison between *the day of man* and *the DAY of the LORD*.

[1199] Common-law courts, for example, refuse to enforce every naked promise men make, but only those supported by consideration or by the promissee's justifiable reliance on the promise. In this day of man's judgment, law consists as much in rules concerning how men are to deal with their inevitable wrongdoings as with their intentional wrongs. Some laws are in place merely in an attempt to bring order to the devastating results of the hardness of men's hearts. For example, although God hates divorce, God deems divorce a non-criminal matter. *See, e.g., Deuteronomy* 24:1.

Nevertheless, God's Word calls the Christian to the Kingdom of Heaven's higher standard: above passive justice to graciousness and proactivity.

It is never the prerogative of a country's government to demand that men be gracious (accepting) one toward another. The other side of the right of freedom of association is freedom to refuse association with those one does not accept: i.e., one's freedom to withhold personal acceptance of others. Thus, King Alfred's less-ambitious golden rule in the passive voice is in keeping with the common-law principle as it has stood for centuries; though falling short of Christ's proactive rule, it is consonant with Scripture.

Absent a relationship demanding otherwise, the common law never has, nor does it now, demand that one accept the company of, or even help, one in distress; it does demand, however, that one never further injure any distressed person. Alfred was correct, justice requires less than does grace and, thus, is often passive: it does not always require action but, rather, a forbearing to act. Scripture and common law demand that human governments enforce justice respecting all men. From God's people Scripture requires, in addition, grace (acceptance).

In the Sermon on the Mount, Christ draws the difference between justice and graciousness (grace) in two ways. *First*, at the outset, He affirms all of God's law and justice as good and proper: "You ought not think that I have come to tear down [*καταλυσαι: akatalusai*] the law or the prophets; I did not come to tear down . . . ."[1200]—, while summoning his hearers to the higher standard of graciousness (grace). *Second*, before each of His illustrations, Christ recites the standard of justice presented for consideration and then expounds the higher standard of graciousness. For example, He says: "You have heard that it is said . . . an eye for an eye; but I am saying to you . . ."[1201]

[1200] *Matthew* 5:17.

[1201] *Matthew* 5:38. This verse dissuades an aggrieved party from using the courts as a tool to *get even*, just as a party ought never seek to exact an equivalent pound of flesh through private means. Either method amounts to vengeance, which is forbidden because vengeance belongs to God alone. *See Deuteronomy* 7:9–10, *Romans* 12:19, *Isaiah* 59:17–18. The terms of these verses stress the precise evenness of God's judicial retribution. God's judicial preciseness is His character.

By contrast, man's judgment pursues only fair play by observing due process; only substantial justice in judgment. *See* International Shoe Company v. Washington, 326 U.S. 310; 66 S.Ct. 154 (1945). Because God achieves perfect precision in judgment and man never can, Christ warns His hearers not to "square off" (*αντιστηναι: antistaynai*, to stand opposite as a mirror image of resistance) with the one that has done you evil (*τω πονηρω: toe ponayroe*, by the letters, "the evil one"). *See Matthew* 5:38. Again, the terms Christ uses create a context of precision in order to highlight the futility of man using

In sum, *justice* entails righting the wrong by punishment befitting the crime, *mercy* forbears to exact the punishment that befits the crime, and *grace* or graciousness replaces deserved punishment with acceptance and a beneficial reward. Though justice, mercy, and grace are to be distinguished, they remain related; to ignore any of these three will impede the effect of the other two. As a single thread folded back on itself thrice[1202] in order to more than triple its strength by also shortening its length, justice, mercy, and grace each compliment and multiply the effectiveness of the other: justice preserves a country; mercy establishes its government; graciousness enables the wisdom to know when to administer justice and when to forbear in mercy.

§ 4.3.3
Juror –*vs*– Legislator

The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues.[1203]

The common-law tradition, holding that God has bestowed upon every person the ability to discover the truth of the law and its refined applications, is consonant with Scripture.[1204] Sometimes called *natural law*, this ability is never confined to an elite class—as the Roman tradition[1205] and Islam[1206] hold—, but is native to every member of Adam's race, rendering each person's obligation to discern and follow truth independent of any other's obligation. Each person will answer straight to God.[1207]

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the courts to achieve the perfect equality characteristic of God's righteous vengeance and retribution. *Id.*

[1202] *See Ecclesiastes* 4:12. Used in Scripture seven times, טוח (*tuck*) signifies the large effect of that which is small, otherwise insignificant, or even negative. For example, Rahab's scarlet cord (*tuck*: when red, the sign of a whorehouse, as a red light in modern times) was the sign that diverted judgment, protecting her entire family from God's judgment of death. *See Joshua* 2:18. So also, the lamb's blood on the doorpost was the sign that diverted the judgment of the LORD from the Hebrew family within. *See Exodus* 12:23.

[1203] Hinish v. Meyer & Frank Co., 166 Or. 482, 113 P. 2d 483, at 447.

[1204] See generally § 5.1.2 of this book (contrasting Scripture's presentation of natural law with scholasticism's notion of natural law).

[1205] See generally § 5.1.3 of this book (discussing Rome's scholastic tradition).

[1206] See generally app. 10 of this book (discussing Islam's dependence upon elite men called *sha'f*, deemed alone qualified to exercise superior reasoning power).

[1207] True crimes are those acts that are inherently evil as revealed by nature and in accord with Scripture, legislation notwithstanding. For example, in England, no legislative act forbids premeditated murder or otherwise declares it a crime; moreover, no act of Parliament will ever render premeditated murder anything other than a crime. History

Since, however, this law of nature is present in every person and available for use, including legislators, why does the common-law tradition accord finality to the Jury's verdict over the acts of legislators? The answer lies in the independence of the courts, the foundation of the common law's separation of powers;[1208] indispensable to the independence of the courts is the independence of each juror. The common-law tradition accords finality to the Jury's verdict over legislation because unlike the legislator's office, the juror's seat in the Jury box offers no chance for personal glory, prestige, popularity, or an ongoing paid position, and thus, no temptation to these. Moreover, jury duty never demands the juror's economic dependence on others.

Unlike the legislator, the juror is never chosen by popular vote following a campaign, but drawn at random—often against his desire—mere minutes before trial and is subject to being struck from jury duty by either party for bias or without revealing the reason.[1209] Unlike the legislator, the juror is never a volunteer: the common law never gathers jurors by asking for volunteers. Once drawn, however, the juror must do his duty. The common law disallows volunteer jurors, competing for a seat on the Jury; such practice will corrupt the genius of the Jury as a fortuitous sampling of the countryside and will reduce the Jury to a weapon of vengeance and the powerful. Unlike the legislator, the juror's seat never brings the temptations for personal gain, the lust for political popularity, and the rash expediency necessary to win the next election.

While the civil-law tradition has no jury, the common-law tradition comprises both legislators and jurors, and depends upon natural law to exert its effect through both. The common law and the civil law, however, rely upon their differing understandings of natural law: the common-law

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teaches that for legislation to declare behavior criminal that Scripture never declares criminal, is to set in motion a parasitic industry of government officers, investigators, prosecutors, pubic defense attorneys, prisons, and all the government contractors necessary to maintain these. See generally United States v. Wilson 159 F.3d 280 (7th Cir. 1998) (R. Posner, dissenting), for a discussion of *malum prohibitum* (acts said to be a criminal only in the sense that the legislature forbids them), and *malum in se* (acts inherently immoral regardless of any human legislation).

[1208] See generally § 5.1.5.5 of this book (discussing the common-law requirement that the courts, the legislature, and the executive powers remain separate and independent and Supreme Court Justice Harlan's sensitivity to the importance of separation of powers and independent courts, including his extreme care to avoid any appearance of familiarity with the executive).

[1209] In cases where not enough of those summoned to jury duty respond and the sheriff cannot find them, some jurisdictions provide for sending the sheriff's deputies into the roads and streets, highways and byways surrounding the courthouse to compel those they handy into the courthouse to serve as jurors. Because Jury duty is involuntary, Jury verdicts are more reliable.

tradition accords to each juror the ability to discern, from the facts, fairness for the parties before the court;[1210] the civil-law tradition holds the scholar-legislator able and willing to fashion legislation applicable uniformly to all.

The common law's trust of the Jury's verdict as final over the acts of legislators is not because the juror has inborn superiority over the legislator—both suffer human weaknesses and outright flaws—, but because the character of the juror's duty, and the method that places him in the Jury box, provides checks and safeguards to the flaws inborn in his mind and soul. By contrast, neither the character of the legislator's position nor the political process bringing him to it provides such safeguards against his inborn human flaws.[1211] In addition, the legislator is a representative: having sought his office with vigor, he is an agent bound to the pleasure of those he represents, answering to those he has persuaded to place him in his privileged position and able to remove him.

The juror, on the other hand, represents no one: having never sought his position, he is neither agent of any other nor bound to the pleasure of any other. He is, rather, a sample drawn from the neighbors of the parties before the court. As does a witness under oath, a juror answers only to God[1212] and to his conscience, to which he is bound to follow according to the light provided. Further, unlike the legislator, the juror depends upon no one for his jury seat. In fact, the potential juror has neither incentive nor desire to seek a juror's seat or remain in it longer than duty demands.

To sum up, the juror never seeks his authority and power, which is short lived and focused on a single set of operative facts concerning the parties before the court. By contrast, the legislator seeks his authority and power, which is broad (applying to all alike) and of long duration (lasting through his term of office). Further, unlike the juror's verdict, which rests upon the reliability of historical facts established in the heat of trial, the reliability of legislators' acts unavoidably rest upon future

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[1210] See generally § 5.1.2 of this book (contrasting the common-law concept of natural law and the civil-law concept of natural law). See also generally § 4.6 of this book (comparing the common-law obligation upon every individual to uphold and follow the law, where the government commands contrary, against the civil law's provision of a safe harbor and complete defense to any crime as long as one acts in obedience to the state).

[1211] *See generally Romans* 7:19–25 (discussing inborn human flaws, revealing their source and their remedy).

[1212] *See*, *e.g.*, MASSACHUSETTS PROCEEDINGS IN CRIMINAL CASES RULE 278 § 4; OHIO REVISED CODE § 2945.28; TEXAS CODE OF CRIMINAL PROCEDURE § 35.22, for the requirement that the juror's oath be made to God.

contingencies that are neither tried nor try-able.[1213] Finally, even if an individual member of a legislative body has freed himself from the temptations for popularity and for government largess for himself[1214] and for the interests that support him, his convictions remain subject to the majority of his fellow legislators. The lone juror, however, retains the authority and power to veto any popular majority, legislative majority, or majority consensus among jurors.

The common-law tradition accords finality to the Jury's verdict over legislation because the juror's position, and the manner of placing him in it, frees him from dependency, which gives motive and opportunity for bias. For his verdict and any reasons behind it, the juror is neither obligated to any other nor answers to any other, except God. The legislator, on the other hand, is dependent, holding his office by unending reciprocation. The legislator is a kept man.

In sum, where one stands on any particular question depends upon where one sits: a seat in the legislature or a seat in the Jury box. The common law accords finality to the Jury's verdict over legislation in individual cases, but the civil-law tradition accords supremacy to the legislators' will in all cases. This difference between the two traditions stems from their differing understandings of two doctrines: natural law and the moral weakness of every person.

[1213] Legislation is unavoidably speculative; Legislative records reveal an inherent preoccupation with guessing the future: debating future behavior and future results of proposed legislation. By contrast, the common law requires jurors to confine their consideration to past behavior of the parties before the court and to justice concerning that behavior; the effect the Jury's verdict will have on future cases is never to be the juror's concern. The legislator, however, can speak only to widely applied contingencies of the future; the juror's verdict speaks to focused facts of the past.

Legislative authority over future behavior (preemptive power) is called *police power*, which the common-law tradition confines to the public health, safety, and welfare. *See generally* COOLEY, *supra* note 61, at 572–97 (treating the constitutional limitations that rest upon the police power of the several states). "This police power," says Cooley, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all private property within the State." *Id.* at 573. In America, our law defines the police power of government territorially: the several states have absolute authority to exercise police power, each within the confines of its borders. The Constitution restricts the federal government's exercise of police power within the boundaries of any state to enclaves of federal property, such as federal military instillations and federal courthouses. America's constitutional doctrine of federalism, therefore, reserves nearly all American *police power*—statutes in anticipation of possible public harm—to the state legislatures.

[1214] Though law empowers American legislators to set their salaries, one searches in vain for an instance of legislators cutting their own pay or bringing any other economic disadvantage to themselves. Legislative office brings to the legislator opportunity and advantage unknown to the juror.

§ 4.3.4
Jury Adaptability

When our . . . ancestors removed to America, they brought . . . [the right to trial by jury] with them, as their birthright and inheritance, as part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power.[1215]

Lord Mansfield is best known for his innovations respecting the Law Merchant that came to form the basis of the Uniform Commercial Code. Mansfield—a Scotsman named William Murray—discerned particulars from the civil law that encouraged commerce and then engrafted these into the common-law tradition, while subjecting them to the common law's first principles. He recognized that for Britain to compete in international trade, English common law must expand the application of its first principles to a fast developing domestic and international commercial law pertaining to merchants and mariners.

As disputes concerning international transactions came before the English courts, Mansfield searched out men familiar with the customs of commercial law and international trade, and empanelled them as a special Jury. These merchant-jurors fulfilled the ancient common-law demand of jurors being peers of the merchants before the court. They understood the commercial issues that came before the court and the parties' experiences and circumstances as merchants. Mansfield acquainted himself with these special jurors to learn their *customs* of trade, while also insuring that they understood the common law's first principals:

> When he was Chief Justice dealing with commercial cases Lord Mansfield introduced special juries of businessmen in the city of London to assist him in trying these cases. He took great pleasure in learning the practice in different trades and not only consulted the merchants in court but invited them to dine with him at his house in Bloomsbury Square. The merchants for their part admired and respected the judge.[1216]

[1215] STORY, *supra* note 89, at 656.

[1216] HEWARD, *supra* note 386, at 104. Though Mansfield's use of the Jury of merchants was an innovation in the common-law courts, from earliest times, the English had empanelled merchantmen to form juries by sitting with judges in the maritime courts. Marsden cites the report of a trial from the year 1383 in the maritime court of Padstow

The common-law tradition protects the sanctity of personal commitments in business such as individual liberty to freely associate and contract. Mansfield's innovation of merchant-jurors demonstrates that common law, conceived and developed upon the property rights of farmland, will adopt the advantages of a system based on civil-law precepts, such as the law merchant, strengthening the common law's relationships freely entered, instead of sacrificing them to the will of the state. The commercial law was without the same sensitivity for personal freedom and property-protecting processes as the common-law, such as trial by jury. The customs of the commercial law, however, did offer technicalities that were helpful—if subjected to common-law due process and *stare decisis*. Lord Mansfield's innovations laid the foundation for the present Uniform Commercial Code now adopted in American state jurisdictions.

In time, however, the English press, suspicious of Lord Mansfield's attention to commercial and maritime law, accused him of quoting in his findings Roman law instead of Magna Carta or the English Bill of Rights. However, because transactions involving merchants and shipping under the flags of civil-law states were before the court, his references to civil law were unavoidable. "[A]n examination of the cases," says Heward, "shows that Roman Law was quoted in surprisingly few [of his] cases." Moreover, though "Roman law is very occasionally referred to . . . no case was ever decided were Roman Law prevailed over English Law."[1217]

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before the mayor, burgesses, and a Jury of mariners and merchants. *See* 1 R. MARSDEN, SELECT PLEAS OF ADMIRALTY 49, *cited in id.* at 100.

[1217] HEWARD, *supra* note 386, at 137. Lord Mansfield his, however, was not without critics. Beginning on 14 November 1770, the *London Evening Post* published a series of letters from one writing under the name "Junius," criticizing Lord Mansfield for his nativity (he was a Scotsman), for being a Jacobite (his father and brothers had been jailed for their Jacobite activity), and for enlarging the power of the Crown at the expense of individual freedom:

> In contempt of the common law of England, you have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations and the opinions of foreign civilians, are your perpetual theme; but who ever heard you mention Magna Carta or the Bill of Rights with approbation or respect? By such treacherous arts the noble simplicity and spirit of our Saxon laws were first corrupted.

Id. at 129. Junis "wrote anonymously and his identity has never been satisfactorily established." *Id.* at 127, *citing* 3 W.E.H. LECKY, A HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY 234 (n.d.).

We conclude that since the Jury fits well traditional civil-law matters such as admiralty and commercial law cases, it is even more well fitted to common-law matters that the courts now take from the Jury, such as, for example, matters of fundamental and constitutional rights.

§ 4.3.5
Jury Authority & Power

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former.[1218]

The more modern authorities . . . each . . . confirms that the jury's constitutional responsibility is not merely to determine the facts but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. The point is put with unmistakable clarity in Allen, which involved the constitutionality of statutory inferences and presumptions . . . The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' . . . . [1219]

Though best known for setting the laws of trade and commerce on the foundation of the common law and the Jury, Lord Mansfield's distinction between the *authority* of the Jury to judge and determine the facts of a case, and the *power* of the Jury to judge and determine the law[1220] is of even greater influence. Mansfield's distinction between jury authority and power remains with us. Common-law courts have adopted Lord Mansfield's view, resulting in their trying to confine the Jury's judging to facts and not law. To achieve this goal, the courts have reasoned that the judge is duty-bound to do three things: inform jurors of their authority to judge the facts, insist that jurors are without authority to judge the law, but never inform jurors of their raw power to judge the law or to bring in a verdict in the teeth of the facts.

According to Lord Mansfield's view, to instruct a juror—or anyone else—that he can exercise power absent authority or right is to endorse lawlessness. Clearly, judges have no right to endorse lawlessness; those following Mansfield's view, therefore, reason that judges must never inform jurors of their naked power to judge to law, lest a run-away jury

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[1218] STORY, *supra* note 89, at 424.

[1219] United States v. Gaudin, 515 U.S. 506, 514–15 (1995).

[1220] *See* How. St. Tr. 21:847 (1785). *See also* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 41–44 (1998).

become lawless. Mansfield's theory is reasonable, however, only if his premise is correct: i.e., that the Jury holds authority to determine the facts of a case, but merely unwarranted power to judge the law.

Building upon Lord Mansfield's claim that the Jury is free to exercise its power over the law without the right to do so, common-law judges have reasoned that trial by jury lays the determination of the case upon the conscience of each juror as each is found at the time of empanelling, whether uninformed, misinformed, or informed aright. It is, therefore, outside the province of the judge (or so the judges have said) to tamper with any juror's conscience by attempting to further inform his conscience of his power to judge the law. Rather, say the judges, each judge is duty-bound to insure that each juror approach the case as an un-tampered-with representative sample of the conscience of *the country*—in ancient times signifying the local countryside. In a word, judges are to instruct the Jury respecting the law, but must never tell the Jury of its power to judge, or even disregard, the instructions of the judge respecting the law.

Justice Willis, however, disagreed, dissented from Mansfield's position, and claimed for the Jury both authority and power over law and fact. If we claim the power of the Jury to judge the law, Justice Willis replied, we must do so in recognition of its right. Justice Willis's position is consistent; Lord Mansfield's position is inconsistent, holding that we must bow to the Jury's power absent its right to exercise it: a dangerous precedent and principle. Lord Mansfield's allowance of the Jury's unauthorized power to stand in judgment of human expressions of law[1221] is an abstract mental distinction with dangerous and far-reaching consequences. If the Jury are without authority to determine the lawfulness of human attempts to express law—i.e., legislation in its various forms and under divers labels—a lone employee of the state called the judge[1222] is allowed power over the outcome of the case. The result? The Jury have become a nullity.

Our courts thus far, though sometimes with disgust and at other times not at all, have held respect for Jury's prerogative to bring in their verdict in the teeth of both the law and the facts. If the power of the Jury to do so is legitimate, then one must concede that such power proceeds from

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[1221] The writer uses the phrase *human law* and *human expressions of law* to signify man's attempt to give expression to the application of a principle believed—or at the least deemed—divine.

[1222] *Lone employee of the state* is the Supreme Court's appellation for the trial judge. *See* Blakely v. Washington, 542 U.S. 296 (S.Ct. 2004).

right, founded on a sense of responsibility that presumes a conscience rightly informed. Exercise from right of such power is never a naked usurpation. To deny the Jury's authority to stand in judgment over the law and its applicability to the case before it, however, is to ignore the individual juror's innate ability to recognize false expressions and applications of law, and his independent responsibility to weigh up human expressions of law against his sense of the divine standard. Moreover, to deny the Jury's right over the judge's notions of the law is contrary to Scripture's and the common-law tradition's independence of the judiciary.

In any event, determination of the facts as well as application of the law and the legal conclusion of guilt or innocence all remains with the Jury. Thus, by applying the law to the facts and then coming to a verdict, free of any other authority or force, the Jury is judge of the facts and of the law.[1223]

§ 4.3.6
Twelve Jurors –*vs*– One Judge

The Framers would not have thought it too much to demand that before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbors," [Blackstone], rather than a lone employee of the state.[1224]

In 2004, the United States Supreme Court upheld the common-law right of trial by jury. The Court's majority appealed to the common-law tradition as the Founders' intended standard for constitutional interpretation, and in further support, quoted Blackstone's *Commentaries* (1769) and Bishop (1872). Moreover, the Court held that the Founders intended a separation of powers, not only of the judiciary

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[1223] *See* Sullivan v. Louisiana, 508 U. S. 275 (1993); Court of Ulster Cty. v. Allen, 442 U. S. 140, 156 (1979); Patterson v. New York, 432 U. S. 197, 206 (1977); In re Winship, 397 U. S. 358, 364 (1970).

[1224] Blakely v. Washington, 542 U.S. 296 (S.Ct. 2004) (second brackets in original). Increasing the number of judges appointed from government service makes fewer those appointed from private practice, magnifies the significance of the Court's phrase *lone employee of the state*, and threatens the independence of our judiciary. Contrary to the spirit and custom of the common-law tradition, career government judges are prone to unhealthy bias toward government and against the accused. "[E]very defendant," said the Court, "has the right to insist that the prosecutor prove to the Jury all facts legally essential to the punishment . . . That should end the matter . . . ." *Id.*

from the other two branches, but even within the judiciary, i.e., between judge and Jury.[1225]

The Sixth Amendment's guarantee of trial by jury, said the Court, allows only the Jury—never the judge—to determine facts; to hold otherwise allows the judge unconstitutional power. "[A] judge may impose [a sentence] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." The Framers' plan for criminal justice is the common-law ideal of limited state power accomplished by clear division of authority between judge and jury, which the law preserves without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. In sum, the Court identified the Sixth Amendment right to trial by jury with the common-law right to jury trial, holding that the Jury are a pillar of our common-law tradition as contrasted with civil law.

The common-law Jury are traceable as far back as the early continental Anglo-Saxons and Danes; its principles are discernable even further back in history. The common-law requirement of one dozen petit jurors conforms to Christ's example of assembling the same number, called Disciples, appointing them to be witnesses of his public ministry: from the days of John the Baptist until His resurrection and ascension. An odd number of disciples was unnecessary because—as with common law's twelve-person trial or Petit Jury—unanimity was required of these twelve witnesses to the life, resurrection, and ascension of Christ.[1226] That the Disciples understood the necessity of the number twelve is seen in their determination to replace Judas.[1227] To be sure, the number twelve bears significance in Scripture. The Bible, however, nowhere by overt words, tells out the significance of the number twelve; but nonetheless, gives examples plenty, revealing that the number twelve has to do with *rule* and *ruling*. In short, the Jury's judgment of fact is final, satisfying due process, the law of the land.[1228]

[1225] *See id.*

[1226] *See Acts* 1:21–23.

[1227] *See Acts* 1:15–26. See also generally § 4.3 of this book and accompanying notes (expositing and expositing 1 *Corinthians* 1:1–6 and discussing the ancient Hebrews' local trial court and Jury, which they called the Unauthorized Bench of Twelve).

[1228] *See* U.S. CONST. art 7. To relegate the occurrences of the number 12 in Scripture to coincidence is absurd. Consider, for example, that from Seth to Noah were 12 ruling patriarchs and from Noah to Jacob were 12. Though Jacob had 13 sons, in each of the 18 times his sons are listed, only 12 are included, always omitting from each of the 18 lists, one son, not always the same one, but always according to the purpose of the list. *See also further Genesis* 35:22, 42:13, 49:28. The Bible records 12 judges raised up to rule during the period of the Judges.

During Rome's occupation of Britain, however, the Anglo-Saxons discarded the dozen as an accepted measure of satisfaction; the Danes then reestablished it in the Island. Though its origin remains obscure, the importance of the number twelve—no more and no less—, as respects the trial Jury, has never waned, says Chesterton, remaining unsurpassed in its efficiency, reliability, and standing on the best of precedents:

> Our civilization has decided, and very justly decided, that determining the guilt or innocence of a man is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library cataloged, or a solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is serious it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.[1229]

The Jury of twelve, drawn at random, functioning as a panel of trial judges over the facts and application of the law, and requiring unanimity has from earliest-known times been the mainstay of judging among the tribes in the north of Europe, even until the mid-eighteenth century.[1230] Further, the first-century Hebrew local council of twenty-three men and

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In the High Priest's breastplate were 12 stones for each tribe. In addition, 12 stones were taken out of the Jordan for each tribe. *See Joshua* 4:3, 8–9, 20. In the New Testament, there are 12 apostles, 12 foundations of the heavenly Jerusalem and 12 gates, 12 pearls, and 12 angels. The number of disciples waiting for the Holy Spirit in *Acts* 1:15 was the Danes' long hundred of "about 120," or 12 times 10. The New Jerusalem measures 12,000 furlongs square and the wall measures 12 cubits square. *See Revelation* 21:16–17. Of the 12 tribes, God seals 12,000 from each, which is 12 squared, or 144,000. *See Revelation* 7:4.

Thus, from the foregoing one can reach two firm conclusions: the number 12 in Scripture signifies those persons that have ruled or will rule and betokens those places from where them to come will rule. *See also, e.g., Genesis* 14:4, 17:20; 2 *Samuel* 2:5; 1 *Kings* 7:25, 44; 2 *Chronicles* 4:15, 10:20; 2 *Chronicles* 9:19; *Mark* 5:42; *Luke* 2:42; *John* 11:9; *Revelation* 12:1. However, some occurrences of the number 12 in Scripture have less clear significance. *See, e.g.,* 2 *Chronicles* 11:30; *Nehemiah* 5:14; *Matthew* 9:20, *Mark* 5:25 (a disease lasting 12 years); *Luke* 2:42, 46 (Jesus 12 years old when He spoke with the *των διδασκαλων, tone didaskalone*: "the doctors"); *John* 11:9 (12 daylight hours); *Revelation* 22:2 (tree of life bearing each month 12 kinds of healing fruits).

[1229] G.K. CHESTERTON, *The Twelve Men*, TREMENDOUS TRIFLES 55 (1930). See generally § 4.3.6 of this book (discussing reasons for the common-law requirement of twelve petit jurors). The film, TWELVE ANGRY MEN (1957), provides a fictional but informative look at a New York Jury's struggle toward truth.

[1230] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *350.

the customary common-law Grand Jury of twenty-three jurors are alike in purpose and form, if not related as progenitor and progeny. As did the Hebrew local council, the common-law Grand Jury has authority to indict but never to convict. Because the standard for indictment is lower than the law's demand of unanimity for conviction at trial, the number of grand jurors is odd; unanimity is not required in every matter.[1231] Unlike the trial Jury of twelve, neither the Hebrew local council nor the Grand Jury, consisting of an odd number of twenty-three persons, can be a hung jury. For the same reasons, the Sanhedrin—also called the Great Council in Jerusalem—consisted of an odd number of seventy-one men.

The common law has always demanded the unanimity of twelve jurors on the ancient knowledge that the God of creation is never double-minded. Therefore, though Jury unanimity never guarantees a right verdict, anything less than unanimity falls short of the mind of God.

§ 4.3.7
The Jury & Government

A major component of lawful government is the Jury of judges.[1232] As does common-law government, Scripture's model for government has three offices, each of its own jurisdiction. *First*, the Bible gives authority for a body of elders to direct the work of deacons, advise, teach, instruct, provide oversight, warning, guidance, and individual advice to all others, foremost by example but also by word.[1233] *Second*, the Bible requires empanelling the Jury, receiving its authority from the disputing parties and the assembly to discern particular justice in disputes between individuals,[1234] according to their relationship, and having authority in the common sense of unanimity. *Third*, in case of one's unwillingness to abide by authority under the foregoing standards, the Bible outlines due

[1231] The standard of proof for the Grand Jury to indict (proof by a preponderance of the evidence: i.e., more likely than not) is also lower than the standard of proof for the trial Jury to Convict (proof beyond a reasonable doubt: super proof).

[1232] *See* 1 *Corinthians* 6:1–6.

[1233] Elders are without authority to dominate others and are, rather, to be examples. *See* 1 *Peter* 5:3 ("Neither as overruling God's heritage, but becoming examples"), *Philippians* 3:17 ("Brethren, become co-imitators of me . . . you have us for an example"), 1 *Timothy* 4:12 ("You become a pattern for the believers, in word, in behavior, in charity, in love, in faith, in purity"), *Titus* 2:7 ("In all things showing yourself a pattern of good works"). *See, e.g.*, JOHN WINEBRENNER, BRIEF SCRIPTURAL VIEW OF THE CHURCH OF GOD (1885) (showing from Scripture the presbyterian form of church government, viz., by elders, also called presbyters). The presbyterian form (rule by elders) need never do away with local church autonomy.

[1234] See generally § 4.3 of this book (expounding 1 *Corinthians* 6:1–6).

process for instances of discipline and elders to insure observance of that discipline.[1235]

These three offices occupy three jurisdictions, each of different procedures and each demanding close individual participation, personal discernment, and direct responsibility to God. With the scriptural processes of these jurisdictions, the common-law tradition is consonant. As the Jury are the gravitational center of the entire common-law tradition, the Jury are further the gravitational center of right government, holding all in balanced orbit. Biblical government is non-existent absent the Jury of judges. Where the Jury have authority to judge, it is also empowered to answer two questions: what happened (called questions of fact) and how the standard of law applies to those facts (called questions of law). Regardless of the jurisdiction, God remains the fountain of all law, whether given indirect through another, such as a teacher[1236] or parent;[1237] or direct to the individual.[1238]

Any assembly that neglects the use of the Jury, according to 1 *Corinthians* 6:1–6, tempts its members to depend upon a leader or leaders to dictate personal behavior and choices to the individual, forfeiting biblical government altogether. To subject one's self to the edicts of mere human will is to allow pretending mediators–middlemen, a priesthood, wolves in shepard's clothes[1239]—to stand between God and the individual, fostering false teaching and idolatry, fomenting in government abuse of power and other lawlessness elsewhere.

§ 4.4
Going to Law

William Tyndale introduced the common-law phrase *go to law* into the English Bible through his translation of κρινεσθαι (*krinesthai*: middle voice, meaning "to submit one's self to judgment") in 1 *Corinthians* 6:1 and 6–7. Tyndale translates from the original: "How dare one of you having business with another, *go to law* under the wicked and not rather under the saints?"[1240] Earlier, John Wyclif had translated 1 *Corinthians*

[1235] *See Matthew* 18:15–22.
[1236] *See Ephesians* 4:11, *Titus* 2:3.
[1237] *See Proverbs* 1:8.
[1238] *See Romans* 2:14–15.
[1239] A false middleman seeks profit. See generally § 2.6.1 of this book ad accompanying notes (discussing *Matthew* 17:15, as respects wolves in sheep clothing being those posing as shepard-leaders in order to dominate for gain).
[1240] Emphasis added.

6:1 from Jerome's Latin: "Dar any of you that hath a cause ayens [against] another, be demed [*judged*: from the Anglo-Saxon "doomed"] at [*by* or "in the presence of"] wickid men, and not at hooli men?"

Tyndale's translation, "go to law," respects the division of the English courts of his day into two jurisdictions: *law* (abbreviation for "common law") and *equity* or Chancery. In England, the priesthood held jurisdiction over matters of equity, necessitating power over persons more than things, such as marriage, wills, adoptions, estates and trusts, and injunctions. English equity courts founded their principles on "the law of God or on conscience . . . Later . . . on equity . . . or the law of nature."[1241] Further, the equity courts had jurisdiction where the common-law courts offered no relief for wrongs alleged. The English also called the equity courts the *courts of conscience*. Three things, said Coke, "are to be judged in [the] Court of Conscience; covin, accident and breach of confidence."[1242] Nowadays, the common law calls these three subjects of equity jurisdiction fraud, mistake, and breach of trust.

In Tyndale's day, the prerogatives of the civil-law tribunals of Henry VIII., such as the Star Chamber,[1243] controlled much; Tyndale supported Henry's arbitrary and absolute rule. "He that judgeth the King," wrote Tyndale in *Obedience of a Christian Man*, "judgeth God and dameth God's law and ordinance . . . the King is, in this world, without law; and may at his lust [pleasure] do right or wrong, and shall give account to God alone."[1244] Nevertheless, the common-law tradition was alive; to *go to law* was to bring one's legal dispute to the common-law courts of the Jury, as opposed to the tribunals of the priesthood and equity, which followed civil law, operating without the Jury.

Though Tyndale's translation distinguishes between going to common-law courts outside of the Church assembly (going to law) and keeping disputes within the assembly, if the common-law courts outside the assembly had been working aright, Tyndale's distinction is not akin to the situation of the Church in Corinth. To bring one's cause to judges outside the Church assembly at Corinth was to submit to the pagan Roman judges and the imperial dogmas of Roman civil law; but to give

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[1241] HENRY L. MCCLINTOCK, MCCLINTOCK ON EQUITY 6 (1948).

[1242] *Id.* at 5, *quoting* 4 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 84 (London 1641).

[1243] Not until 1559 did Elizabeth I. daughter of Henry VIII. set up the Court of High Commission, pursuant to the Act of Supremacy to control uniformity of worship. Eighty-two years later in 1641, Parliament dissolved it.

[1244] DICKENS, THE ENGLISH REFORMATION 73 (n.d.) (1964), *quoted in* BOBRICK, *supra* note 316, at 122.

one's cause to the courts outside the Church assembly in England (to *go to law*), was to put one's self upon the common-law's Jury of peers. Further, though the judges of the equity courts of Tyndale's day were clergymen familiar with the canon law; the common-law appellate courts had subdued and subjected the civil-law principles of the equity courts. Indeed, "none of the available decisions," from equity of that day, says McClintock, "shows any direct reference to either the canon law or Roman law."[1245] For example, English equity courts deciding cases according to "the law of God" cite no canon law, and either claim direct knowledge of God's law or cite Scripture.[1246]

Thus, the pertinence of Paul's admonition to use the Jury is less obvious in a country where common-law courts function aright. However, as civil-law notions seep into common-law courts, the apostle's insistence upon the use of the Jury within the Christian assembly becomes germane and even urgent. Indeed, the Church ought always use the Jury, lest through neglect, understanding of the Jury be lost entirely and the Church be caught flat-footed in ignorance—as it now is—unable to provide justice by the Jury, when the common-law courts outside the assembly cease doing so. In a word, the Church remains responsible to maintain, without ceasing, models of due process and justice by use of the Jury. As government regulatory tangles of administrative law bloats government, infringes upon the common-law courts, and supplants the Jury, the need for Church assemblies to empanel the Jury according to Scripture grows.

§ 4.5
Common Law's Rule of Law

As did Alfred the Great, the first Danish King of England Chanute the Mighty, "made a point of submitting . . . to the laws whereby he ruled. At the earliest moment he [Chanute] disbanded his great Danish army and trusted himself broadly to the loyalty of the humbled English."[1247]

The *rule of law* is fundamental to the common-law tradition, but because it admits of different portrayals and embraces related, but nonetheless

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[1245] HENRY L. MCCLINTOCK, MCCLINTOCK ON EQUITY 6 (1948).

[1246] *See id.*, *citing* Anon. 1489, Y.B. 4 Hen. VII., f. pl. 8 (claiming direct knowledge of God's law). See also Earl of Oxford's Case 1615, 1 Rep. in Ch. 1, wherein Lord Ellesmere, a lawyer-chancellor, cites *Deuteronomy* 28:30 for authority as the law of God. See also generally § 3.9.6 of this book (providing historical background of equity courts in England).

[1247] CHURCHILL, *supra* note 62, at 103.

different concepts, it eludes definition. At the least, the rule of law stands for four principles. *First*, it signifies fixed standards of law that are the measuring rule for human behavior, as opposed to the shifting preferences and caprices of men. *Second*, the rule of law is part of the unwritten common-law principle *stare decisis*, which demands court observance of previous findings as binding on cases with like facts. The rule of law and *stare decisis* are mutually dependant doctrines because the rule of law is also the principle that *stare decisis* requires the courts to follow; without the rule of law, *stare decisis* has no fixed standard to follow. Put another way, if a new case arises with facts similar to one already decided, the doctrine of *stare decisis* demands that the court decide the new case on the same principle as the previous case. *Third*, the rule of law consists in court-fashioned *tests* that the courts have used in former cases to determine if a particular principle shall apply in the case now under consideration. Such tests are standards; as measuring rods, the courts use these for measuring like cases of like facts and rendering judgment. *Fourth*, the most well-known feature of the rule of law is seen in the common law's demand that the same standards of law govern every person, no matter how high placed or powerful.

At bottom then, the rule of law is a specific rule of application, distilled from prior court findings on like facts, tailored for the single case before the court, which applies to all persons, never preferring one over another. The rule of law as a common-law ideal grew strong in England in the face of the civil law's encroachment upon common-law courts and principles. Arbitrary monarchs, overzealous of their power, preferred their caprice to the common-law courts' consistency.[1248] In response, common-law courts asserted the rule of law in attempt to protect parties before the court from imperious royal force that followed the maxim of the civil law: the will of the prince is law. The common-law courts developed the rule of law foremost to restrain arbitrary monarchs. The courts used the rule of law as a measuring device or *ruler* to determine whether the activities of those in government were lawful.

Thus, the original concept *rule of law* was the common-law principle applicable to measure government activity. This original concept remains the popular meaning of the phrase *rule of law*. Thus, in our common-law tradition every person—whether high born or low, office holder or private individual—is subject to the demands of the same law: i.e., no person is above the law. This understanding is right. The rule of law connotes the

[1248] See generally § 5.1.5 of this book (discussing civil law's inquisitional characteristics).

supremacy of regular law known in common and followed—custom and *stare decisis*—, as opposed to arbitrary decrees of total state power.[1249]

The facts of any given case will determine which rule one must apply: the rule never establishes the facts; rather, the facts call out the rule. To the common lawyer, the facts reveal the law; only by the court first divining the facts will it find the law in its fitting application. Thus the sayings, every tub must sit on its own bottom, every skin must hang by its own tail, and every case must stand on its own facts. The common lawyer seeks to discover the law's application. He ought never conclude at the outset—as does the civil lawyer—that the state has provided the application for him in its dogmas whether the written code, regulations, or decrees. Common lawyers have called this discernment of the facts' fine likenesses and distinctions the *ratio decidendi* (Latin "reason for deciding"): the point upon which the judgment turns; the fact that swings the decision toward one line of case precedents as opposed to another. The common-law judge, in writing, articulates his findings upon the *ratio decidendi*; his opinion becomes precedent for future cases on like facts.[1250]

Thus in common-law countries, the facts will signify the particular rule of law that the court must apply to the case before it. The common law never grants to the judge the luxury of arbitrarily choosing how he will apply the language of a statute to the case before him. Instead, the courts in former cases, like unto to the one he faces, have set down fitting tests, binding him within fixed boundaries, thereby constraining his personal preferences and biases, while providing tailored guidance. In cases of first impression, where he has no clear precedent, first principles must guide.

Civil lawyers, by contrast, claim to observe the rule of law by insisting that every case, regardless of differences in facts and circumstances, submit in uniform to the same legislation. Legislation, being preemptive and general in its application, the civil-law judge sweeps like cases into the language of the statute without discrimination. Though civil law's Code claims precision, legislation is preemptive, seeking equality, not fairness. Because civil law never binds judges to follow the rules devised by judges in former like cases, litigants stay ignorant of even what rule or statute will govern their case.

[1249] The common law requires consistency in the law's application on similar facts. *See* U.S. CONST. amend. XIV, § 1: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws."

[1250] *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 65–66 (1991).

Our common-law courts often call court-fashioned rules of law *tests* for measuring behavior, which are standards of acute application used to distill three sources of law: common-law principles, narrowly drawn statutes that fail to address the facts of the case before the court, and broadly-drawn statutes that are so general as to be vague. Such tests enable courts to pursue fitting, fair, and harmonious application of the law, fulfilling equal protection of the law for all. Examples include the Lemon Test used in First Amendment cases, the Rule in Shelley's case pertaining to property law, the McNaghten Rules, the Mansfield Rule, the Bruton Error Rule of criminal law, and the Eggshell Rule used in battery cases. Such court-fashioned tests form an indispensable aspect of the common-law principle called the rule of law. To be without the common-law courts' unwritten responsibility to fashion fine-tuned tests to guide future litigants in unpredicted circumstances is to subject litigants to the whims of a judge.

Encroachment of the common law's *rule of law* upon the legislative commands of the state is a basic fear of civil-law jurists: i.e., fear of courts fashioning tests to measure the application of the state's Code. Justinian, fearing that judges would use such tests in judgment of his Code, declared that timeless reason and superior drafting rendered judges unnecessary for its interpretation and that any such attempts by judges will destroy its blessings. The elite used this same fear to foment the French Revolution and the enactment of her civil-law Code. Discerning and independent judgment in application of the law, especially the independent judgment of lawyers and judges,[1251] threatens civil-law culture's messianic faith in the logic of the scholar-legislator's Code—drafted according to the current theories of the intellectual community. In short, court-fashioned rules of law threaten state power. Therefore, civilian judges and attorneys are to enforce without question the specific language of their Code.

[1251] Ethics codes for American lawyers require that each lawyer exercise independent judgment. Thus, each lawyer must recognize that no one, regardless of moral intent, is capable of perfect understanding; and that he must, therefore, exercise healthy suspicion of the legal opinions of others, conduct independent research, and come to independent conclusions. The continued integrity of our law and government depends upon a pervasive individual drive to rightly inform one's conscience so that he will exercise independent judgment right. The common law's adversarial tradition is indispensable to this desire to learn because nothing incites the divinely given natural ability to discover and apply truth as does the indignation arising from real adversity in defense of one's life, liberty, or property. See generally § 5.1.2 of this book (discussing natural law as the scholastic tradition presents it and as *Romans* 2:14–15 presents it).

In summary, the rules of law are judge-fashioned tests that enable the courts to fairly, and even precisely, apply legal principles and standards: measuring instruments for determining jurisdiction and the rightness or wrongness of human behavior.

§ 4.5.1
Rule of Law in the Ancient World

When referring to *rule of law*, the New Testament writers use the ancient Greek term κριτηριον (*krithrion*) two ways: in the Christian common-law sense and in the Roman civil-law tradition. Used in the common-law sense, *krithrion* signifies an instrument, or measuring tool, meant as a legal test; used in the civil-law tradition, *krithrion* signifies the human ruler, magistrate, or even the *place of* judgment[1252] as the measuring tool against which magistrates are to weigh human behavior. Scripture and the common law both measure behavior against a fixed and timeless standard; civil law, however, measures behavior against human rulers, as though divine, or against places and things, as though supernatural. Thus it is said, common law is the government of laws; civil law is a government of men.

In ancient civil law—as yet today—men believed that power over others proceeded from certain created objects: *e.g.*, certain mountaintops, cities, thrones, seats, staffs, crowns, or jewels. Such belief is the essence of idolatry. They further believed that the one gaining control of such an object or place—whether by manipulation or raw force, or both—also gained control of the power attaching to it. For example, men attributed such aura to certain chairs placed in certain places. Thus, the words of the Greek rulers and the Hellenized Roman emperors and governors spoken from *the* throne were εκ κριτηριον (*ek krithrion*): "out of the seat" of power and thus deemed infallible. The later Latin-speaking Romans called such imperial speech, *ex cathedra*. To speak while seated in these special places was to legislate, whether by general decree or by specific judgment. Further, objects such as a certain crown sitting on one's head or a certain scepter in one's hand, men believed to lend power to the one possessing it.

One's belief that getting hold of, or control over, a certain person, place, or thing brings with it the power of legislation—such as bones of

[1252] The Greek suffix –τηριον (–*tayreon*) signifies "place of"; therefore, κρι–τηριον (*krithrion*) denotes, by the letters, the judgment-place or "place of judgment."

holy men, grails, artifacts, and shrouds—is sometimes called occultism. Humanity's unquenchable quest for objects and trinkets believed to bring spiritual or political advantage is the gist of idol worship. Though God can intend objects, under the proper circumstances, for man's learning (object lessons),[1253] objects are never to be for man's devotion, which is worship.[1254]

The Israelites fell into this error by attributing power to mere *things* otherwise meant for their learning and understanding, such as the Ark of the Covenant[1255] and the brass serpent.[1256] Neither the Ark nor the brass serpent was evil, but Israel used them in a manner offensive to God: as objects of worship, attributing power to the *thing* instead of the God who has created all things; such attribution is occultism.[1257] However, even though the LORD once chose to speak from the top of the mountain of Sinai, Elijah discovered that the LORD's authority bestowed to speak God's Word in power was independent of the place from which the LORD spoke and dependant only upon the LORD having spoken it. Further, because the LORD is never a god confined to a mountaintop, men need never travel to any special place in order to receive understanding of Him. The LORD is the God of creation; His ability to deliver truth in power is independent of any place or thing.

Likewise, upon coming of age to serve as a priest, Ezekiel's captivity in Babylon discouraged him because he concluded that being far from

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[1253] Israel's Ark of the Covenant and the furniture set in the wilderness Tabernacle are examples of objects meant for our learning, even though history demonstrates that man is prone to perceive such objects for idolatry. In no instance, however, are men to fashion images, likenesses, or pictures of the true God or any other god. *See Exodus* 20:3–4.

[1254] "Everyone serving graven images shall be ashamed." *Psalm* 97:7. Scripture reveals how to keep from serving idols; the admonition is strong because the danger is great and devastating. *See* 1 *John* 5:21. John's use of the active imperative verb *φυλαξατε* (*fulakssee-ate*) with the reflexive noun indicates a personal (non-delegable) duty to keep sleepless watch in the night (metaphorically, the darkness of this present age): "keep yourselves away from [*απο: apo*] idols."

[1255] *See*, *e.g.*, 1 *Samuel* 4:3: "[T]he elders of Israel said, 'Why did the LORD smite us today before the Philistines? We will fetch the ark of the covenant of the LORD . . . that . . . *it* may save us from the hand of our enemies.'." (emphasis added).

[1256] See 2 *Kings* 18:4, where the Israelites burned incense to the brass likeness of a serpent on a pole that Moses had made, calling it in reverence, brass *thing*: נחשתן (*nacooshtawn*). The Hebrew suffix תן– (*–tawn*) bespeaks that the object spoken of consists of the material denoted by the term's root (נחש: *nacoosh*, brass) to which this suffix appends: נחש־תן (*nacoosh-tan*), viz., brass-*thing*.

[1257] *See generally James* 2:6: "Do not rich men . . . drag you to *seats of judgment*?" (*κριτηριον: krithrion*, Rome's thrones as *places* that give power to those seated thereon) (emphasis added). To believe that possession of, or proximity to, a certain object or place grants power is idolatry.

Jerusalem he was unable to receive the Word of the LORD. The LORD, however, corrected Ezekiel's error. "The Word of the LORD," Scripture says, "came expressly unto Ezekiel the priest . . . *in the land of the Chaldeans* . . . and the hand of the LORD was *there* upon him."[1258] Jonah also discovered that one can receive God's Word, in God's pleasure, anywhere—even while in the belly of a fish, deep in the sea. The God of Scripture is omnipresent (everywhere). In sum, no man will ever escape the immeasurable long arm of God. Neither His Word, nor His presence, nor His power is dependant upon any particular location or object as though He were (may God forbid) merely the god of a mountain.

§ 4.5.2
Rule of Law in Scripture

John's first epistle provides scriptural examples of *tests* or rules of law: yardsticks for the reader to lay alongside individual behavior and even habits, enabling him to determine whether he, or another, is born from above—born of the spirit. John intends that his readers, by applying these tests, become convinced of their spiritual birth, divine sonship, and the authority accompanying these. At least twenty-five times in the epistle's five chapters, John repeats his purpose: that the reader may *know*, as opposed to merely hoping, that he has eternal life—knowing first by his intellect[1259] and then through his experience.[1260]

Having introduced his themes—the new birth, sonship toward God, and sonship's authority—in the first chapter of his Gospel, John weaves these themes throughout his Gospel and on through his epistles. In his first epistle, however, he provides the tools that enable personal confirmation of the themes. Thus, John presents objective tests as standards against which to measure one's behavior in order to discern one's possession of eternal life and that of others. For example, to walk steadfast in the light of God (obedience) is evidence of one's cleansing from sin,[1261] as is ongoing confession of sin.[1262] Further, one's affirmation that Jesus is the Christ is evidence that God is one's Father,[1263] as is

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[1258] *See Ezekiel* 1:3. The Hebrew term meaning *there* (שׁם: *sham*) is the key term of Ezekiel's prophecy.

[1259] Greek *οιδα* (*oida*).

[1260] Greek *γινωσκω* (*gi-knowsko*).

[1261] *See* 1 *John* 1:5–7.

[1262] *See* 1 *John* 1: 8–10.

[1263] *See* 1 *John* 2:22–23, 4:2.

loving others also born from above,[1264] in deed and according to truth, but not by the tongue only.[1265] In addition, one's belief of the *record* that God has made of His Son[1266] is evidence of possession of eternal life. Such are the measuring rods or tests for determining the presence or absence of eternal life.

§ 4.6
Common Law & Loyalty to Law

[W]e are bound in conscience, because we are bound by superior laws, before those human laws which were in being, to perform the one and abstain from the other.[1267]

The Constitution demands that every government office holder in America swear his oath to uphold the Constitution.[1268] This oath is not to a mere man or woman: i.e., someone as fallible and fickle as the oath taker. Indeed, to inspire and motivate, one must swear one's oath in good faith to something greater than one's self; if not, it is meaningless.[1269] In contrast to the common law, traditional civil law demands a pledge of allegiance to the weakness of humanity, entrusting oneself to the fickle

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[1264] *See* 1 *John* 3:14.

[1265] *See* 1 *John* 3:18.

[1266] *See* 1 *John* 5:9–12. Rotherham translate μεμαρτυρηκεν (*memartuayken*), by the letters, with *testified*; Young translates *witness*. The translation "record," however, is fitting because *memartuayken*, being the perfect form of the verb, signifies perfected testimony: testimony made permanent, having been set down to writing.

[1267] 1 BLACKSTONE, *supra* note 12, at 57.

[1268] *See* U.S. CONST. art. VI, cl. 3.

[1269] The Greek term signifying "oath" is ορκος (*orcos*); Latin *orcus*: fences from whose *bourn* or boundaries, once having set one's self within, no one can leave without penalty. Christ confirms Scripture's standard that oath is to be given to God alone because He alone is worthy, and safe, to entrust one's self to as the enforcer of one's oath, insuring that one performs one's vows. An oath is a commitment in self-limitation to do, or hold back (forbear) from doing, a certain thing, usually accompanied by some form of ceremony (formalism). According to Scripture, one's oath is inescapable. *See Ecclesiastes* 5:4–5. To swear by any thing or person other than God is to attribute power to a created thing, which is idolatry. *See Deuteronomy* 6:13–14.

Therefore, one is to swear one's oaths to God alone because to entrust one's self to any orther person or thing is to attribute the Creator's prerogative and power to a created thing. Scripture teaches that to do so—even without understanding and by mistake—is to entrust one's self to demons. Therefore, one is never to swear one's oath to *other men*; God demands that oaths, if sworn, be to Him alone. In the event a witness takes the witness stand in court and puts himself under oath, he bears responsibility to God, the only One to whom God allows him to give his oath, to answer honestly and simply; where possible he is to answer with *yes* or *no*. *See Matthew* 5:33–37. See generally § 4.3.1 of this book (discussing the Scriptural understanding of oaths). If the witness is unable to answer in honesty, yes or no, he must so testify.

hands of men as opposed to giving one's oath to God, placing oneself in His hand.

The common-law tradition's loyalty to law as opposed to the civil-law tradition's loyalty to men shows itself even in our American military tradition. The commander-in-chief of the armed forces of the United States binds himself, hand on the Bible, under an oath of loyalty to a distinct set of written common-law principles (the Constitution) believed to be consonant with the character of God, of which no other loyalty is to override. Further, every military subordinate to the President—from the general officer the teenage seaman—binds himself under a like oath, which is above even obedience to unlawful orders of military superiors. By contrast, military men from many other nations bind themselves in unconditional obedience, swearing their oath of loyalty to a queen, king, or other mere mortal: something or someone as weak, or even weaker than, themselves.

The common-law tradition accounts for the foregoing difference between American military loyalty and military loyalty in civil-law nations. The common-law ideal of loyalty to law as opposed to a man or men is an indispensable foundation stone supporting not only our non-military jurisdictions and ideals, but also our military ideals. Upon entering the armed forces, no man is able set aside his inalienable rights, neither is another able to take them from him. Common-law first principles limit American military jurisdiction—how much more so do these principles limit non-military jurisdiction.

During the war-crimes trials of the Japanese following World War II, those accused asserted their affirmative defense according to their civil law. Even though these defendants admitted having done the deeds of which they stood accused, they claimed innocence because they had sworn a duty to obey *all* orders, without question: they deemed the will of the state lawful, regardless of its lawless commands. Under civil-law precepts, an act in obedience to the orders of one's superior is a safe harbor against accusation of crimes for that act. The Japanese had accepted the deity of the emperor of Japan, declaring him *son of the sun goddess*:[1270] being only a man, the Japanese deemed him equal with

[1270] See generally § 2.1.2 of this book (discussing civil law's religious foundations: civil law's *sons of god* and especially the Japanese emperor's claimed descent from the sun goddess). Lt. Col. John Butler, United States Marine Corps, wrote home to his son a few days before partaking in the American invasion of Japanese occupied Iwo Jima:

> Dear Johnny Boy,

God.[1271] It followed, therefore, according to their civil law, that the emperor's fighting men stood un-condemnable for obeying their emperor-god: the one from whose orders there was no appeal.

By contrast, American General George C. Marshall directed that in courts' martial trials of American soldiers and sailors accused of war crimes, each court had discretion to consider the argument of the defendant that his criminal act was in obedience to orders from his military superiors. General Marshall, however, directed that obedience shall never serve as the sole exonerating fact. General Marshall understood that law allows no excuse for an American fighting man accused of a war crime whose only defense is that he followed orders, when those orders were clearly unlawful. The common-law tradition requires soldiers and sailors to distinguish between God and their officers, whose orders may be contrary to God's character. Thus, the American Military Code of Conduct binds men to obey only *lawful* orders.[1272]

This common-law principle, however, never sanctions disobedience to unwise, seemingly impossible, or even rash orders that are nonetheless lawful. Neither does a mere difference of opinion justify disobedience to earthly government. To be disregarded, the demand in question must be in direct opposition to God's directive or one's lawful oath;[1273] the case

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> Don't worry, Johnny Boy, your daddy will find his way home again. It will be a long time because there are so many things to do. I have to go to a land where little boys your age . . . belong to a thing called *the state* and a wizened old man they call *their emperor and God.*

Lt. Col. John Butler, *Letter to His Son*, quoted in, *In the Field with the Faith of Our Fathers* (visited 4 Mar. 2005) <www.visionforum.com> (emphasis added).

[1271] *See, e.g., John* 5:18b. John uses ισος (*isos*: equal), as distinguishable from ισωτη (*isotay*: also meaning equal, but, less strict, signifying *fairness* or "fair approximation"). *Isos* signifies emphatic equality; the ancient writers used this term to denote exact copies of documents. A papyri of the John Rylands Collection from A.D. 190 has, "I have received this *copy* [(ι)σον] [of notice of death] for investigation." P Tebt II. 301:21, "Catalogue of the Greek Papyri in the John Rylands Library," Manchester I (1911–1915), *quoted in* JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 166 (1930). Therefore, Christ's distracters never accused Him of claiming to be the same person as God the Father, but of making Himself of equal stature and capability with God the Father: i.e., Supreme Deity. Christ is the same and equal essence of God the Father confined to a span.

[1272] The *Westminster Confession* is also consonant with Scripture on this point: "It is the duty of people to pray for magistrates . . . to obey their *lawful* commands . . . for conscience sake [i.e., out of one's own conviction, based on one's own understanding; not out of fear or compulsion, but in grateful obedience to God]. *Westminster Confession of Faith* chap. 23, sec. IV (emphasis added). *See also Romans* 13:5.

[1273] An oath purporting to require supreme loyalty to someone other than God or to obey unlawful orders is an unlawful oath, imposing no duty:

must be clear-cut: obedience to the command must keep one from obedience to God.[1274] Further, when one sincerely believes that a

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> The name of God only is that by which men ought to swear, and therein it is to be used with all holy fear and reverence. Therefore, to swear vainly, or rashly, by that glorious and dreadful Name; or, to swear at all by any other thing, is sinful, and to be abhorred. Yet, as in matters of weight and moment, an oath is warranted by the Word of God, under the New Testament as well as under the old; so a lawful oath, being imposed by lawful authority, in such matters, ought to be taken.

Westminster Confession of Faith, ch. XXII, sec. II. *See also id.*, sec. VII: "No man may vow to do any thing forbidden in the Word of God, or what would hinder any duty therein commanded, or which is not in his own power, and for the performance whereof he has no promise of ability from God." See also generally § 4.3.1 of this book (discussing lawful oaths and providing the complete text of the *Westminster Confession*, ch. 22). Just as common-law contracts or promises to do something unlawful are -not enforceable, one must not vow to do unlawful acts. King Alfred's *Laws* forbade the keeping of a vow if the oath taker discovered that the act he has vowed to do is unlawful.

[1274] That the unlawfulness of an order must be clear-cut to justify disobedience in a military setting is axiomatic:

> A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay and every obstacle to an efficient and immediate compliance would necessarily tend to jeopard [sic, archaic use] the public interest. While subordinate officers and soldiers are pausing to consider, whether they ought to obey, or are scrupulously weighing the facts . . . the hostile enterprise may be accomplished . . . .

STORY, *supra* note 89, at 424. *See also* THE CHRISTIAN AND AMERICAN LAW 109–74 (H. Wayne House ed., 1998). Justice Story's comment sanctions obedience to an unlawful order while in the desperate struggle and confusion of battle, where survival excludes even a split second to ponder. One's obedience to an clearly unlawful order, however, outside the pitched heat of one's being locked in struggle to the death, is inexcusable:

> *[T]he principle of obedience to superior officers is based on the premise that the order given is a lawful one.* In the court-martial trial of Lieutenant William Calley, a unit commander at My Lai in Vietnam who killed more than one hundred innocent civilians, Calley defended himself claiming that he was just following orders of his superior, Captain Ernest Medina. Nevertheless, Lieutenant Calley was court-martialed. The military tribunal that considered his appeal rejected his defense by saying that an order to kill civilians, even if given by a superior officer, did not excuse Calley's conduct because such orders are clearly unlawful.

ROY MOORE, SO HELP ME GOD 205–06 (2005), *citing* United States v. Calley, 48 C.M.R. 19 USCMA 534 (1973) (emphasis added). Judge Kennedy instructed the Jury pondering LT. Calley's case: "Unless you are satisfied from the evidence, beyond reasonable doubt that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit LT. Calley for committing acts done in accordance with the order."

command of government is unlawful, one must exhaust all avenues law provides to remedy such a wrong before refusing to obey.

The records of war-crime trials of both Japanese and German soldiers and sailors following World War II reveal that those accused often failed to grasp why or how the court had found them guilty for loyal and strict obedience to orders handed down from the highest authority they recognized, the state incarnate—whether the emperor of Japan or Hitler. For example, Nazi Adolf Eichmann, standing on the scaffold at Tel Aviv, proclaimed one last time his civil-law defense: "I had to obey the rules of war and my flag." He then added, "It was not my wish to slay people; the guilt for the mass murder is solely that of the political leaders . . . I accuse the leaders of abusing my obedience."[1275] Japanese and German soldiers and sailors accused of war crimes misunderstood their duty because they failed to recognize any authority higher than their semi-deified emperor and führer. The common-law tradition, however, requires men to better discern their duty.[1276]

Though American military forces are under presidential command, Americans are unlikely to expect their military leaders to follow a President who has tried to dismiss Congress. When, for example, President Nixon resigned from office and President Ford swore his oath of office, our military chiefs of staff needed never transfer loyalty from President Nixon to President Ford because they had never sworn fidelity to President Nixon but, rather, had sworn loyalty to the Constitution.

By demanding that our military commanders confirm their loyalty by swearing their oath to the law (the Constitution) and not to men, America is able to avoid the confusion and violence inherent in civil-law states that attends transfer of power from one leader to another. To be sure, American soldiers and sailors bind themselves by oath under the American Military Code of Conduct to obey the President's orders, but the common-law requirement of that Code that these orders be *lawful* tempers this duty. The American military oath of loyalty is to the

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[1275] Though the liability for wrongs done by government officials such as law enforcement officers is non-delegable, the Supreme Court states that liability for such wrongs also embraces those up the chain of authority, "Unlike the Germans of the 1930's and early '40's, we cannot say 'it is all The Leader's doing. I am not responsible.'" 14 AM. U.L. REV. 1, 14 (1964), *quoted in* United States v. Leon, 468 U.S. 897, 974 (1984).

[1276] To accurately discern one's duty, by vigorous study, one must aline one's thinking with the Word of truth. Christian conscience requires right knowledge, thinking about that knowledge in order with God's Word, and the Holy Spirit's impelling motivation to accept and follow the sound conclusions necessarily proceeding from that knowledge. *See* 1 *John* 5:20. See also generally § 5.1.2 of this book, under the heading *Additional Ability Provided to God's Redeemed* (expositing 1 *John* 5:20 and its key term, *διανοια: dianoia*).

Constitution; it is not to any mere man or woman, or any combination of legislators.

One must never swear one's loyalty to the weakness of mere humanity. No man but Christ is worthy of such commitment. Though law transfers the *responsibility* of command from one president to his successor, *loyalty* of presidents and of their military commanders all remain toward the Constitution and laws not contrary to it. One must condition one's military obedience to the President's orders upon the lawfulness of those orders. Every man, therefore, is responsible for his own actions, instead of one man or body of men—the state or chief-of-state—being responsible for everyone's actions, in theory absolving the subordinate of all responsibility. According to Scripture and common law, certifications of authority, demonstrations of power, threats of harm, and harm itself will never cancel one's individual responsibility to never follow the state, its officers, or magistrates into crime.[1277]

The common-law tradition requires each person to discern the lawfulness of orders given him. He can never plead the affirmative civil-law defense—as the Nazis attempted at the Nuremberg war-crimes trials—that he had a duty to obey the orders of the one to whom he has sworn loyalty, and by so doing, the civil law absolves him of personal responsibility and liability.

Because of this affirmative defense, the threshold question at the Nuremberg war-crimes trials was whether the allied powers would try the accused Nazis according to Anglo-American common-law principles of England and the United States or under the civil-law principles of France, Russia, and Germany. The Allies chose the common law because its principles are rightly applicable to all men and conviction was impossible under civil law: civil law exonerates the accused upon showing that his evil was in the will of his superior.[1278] Civil law obligates the court to recognize that following orders is an affirmative defense. Though the common law bars that defense, due process still allows a fair opportunity for the accused to prevail.[1279]

Political figures in common-law countries can never subsume the personal responsibility of any military officer under them to act lawfully;

[1277] See generally *Ezekiel* 18:4, where Ezekiel, the prophet of individual responsibility, states: "[T]he soul, the one sinning, *it* shall die." The Constitution's bar against corruption of blood is in keeping with Ezekiel's declaration. *See* U.S. CONST. art. III, § 3, cl. 2.

[1278] This, according to Nuremberg prosecutor, the late William Franklin Fratcher, as he told the writer in conversation in the spring of 1992.

[1279] See generally 13 MO. L. REV. 45, for prosecutor W.F. Fratcher's first-hand impressions concerning the Nuremberg war-crimes trials.

likewise, military officers can never subsume the personal responsibility of any of their men to act lawfully. The civil-law tradition, however, purports to allow soldiers and sailors to subsume, by their obedience, their personal responsibilities in their positional superiors. In short, the civil law claims that obedience to the state's orders is a safe harbor against accusation of crime. Both Scripture and common law, however, disagree, laying upon each individual the responsibility to adhere to scriptural standards.[1280]

Both the common-law and civil-law traditions require that men find the final test of what is lawful and what is not in their God or gods. The two traditions differ, however, in that civil law accords the attributes of godhood to the state embodied in fallible men and their *de facto* viceroys; the common law never does. The civil-law demands that one look no further than his political leaders' orders to justify his obedience: according the civil law, the fact of the state's command (legislation) is justification. The common law, on the other hand, requires that each person ask his God and himself if the directives of other men are consonant with the character of his Creator as revealed by God's Word and nature.

Men are not authors of authority, but only ministers of God's authority; therefore, all human government is *ministerial*: administering the authority of God in responsibility to God, for the glory of God, and for the good of the governed. Because human government is never to govern from intrinsic human authority, God alone demands the individual's ultimate loyalty. Where human government demands behavior contrary with God's character, each individual remains responsible to follow the will of God. From this principle, two questions arise. *First*, how far afield of God's character must the demands of human government stray before the individual becomes obligated to confront that government? *Second*, at what further point of government's straying is the individual responsible to resist government?

Where a government forfeits its authority by following policies contrary to the character of God, God authorizes confrontation under principles of free speech but not physical resistance, so long as government does not keep one from following God's will as stated in Scripture: honor all men, love the Christian brotherhood,[1281] and take

[1280] *See* 1 *Kings* 13:1–32.

[1281] *See* 1 *Peter* 2:17. The term *brotherhood* (αδελφοτης: *adelfotays*, in the New Testament only here and at 1 *Peter* 5:9) carries the suffix –της (–*tays*) signifying, in this case, mutual agency, which is a common-law partnership. At root, the term is concrete,

God's authority over His earth.[1282] Even where the state tries to physically restrain the man of God's from obedience to the will of God, he must never resist if any means lie open to obey God. Men are to bear up under the burdens of godless government, as much as lies in them to do so.[1283] Simply put: a fellow is obliged before God to put up with much, so long as government does not obtain an injunction or otherwise forcibly bar a fellow's obedience to God—majority and popular opinion notwithstanding.

On the other hand, if government does seek to enjoin one's obedience to God via lawful channels, such as the courts, one is obliged to stand firm by lawful means through lawful channels. If government uses intimidations, threats, and acts of terror (inducing of fear), one can and must petition the court for relief. If, however, one has exhausted all lawful recourse and government force has prevailed against one's right and responsibility to obey God, as God has provided light, then one must chose: either bow to the state's lawless will or continue to obey God.

In weighing this choice, one must determine his loyalty to God. If he is willing to die for his convictions concerning the matter in question, he must follow God in spite of the decrees of the state; if, on the other hand, he is uncertain that he is willing to die for his convictions, he must reconsider his resistance against the state. In all of this, both Scripture and the common law lay upon each person the responsibility to determine whether he will merely confront or actively stand firm against the state's usurpations of power; his responsibility for this determination is non-delegable.

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meaning "from the same womb." With the suffix, however, says Thayer, it means "brotherhood; the abstract for the concrete, a band of brothers" entrusted to a common loyalty, and therefore, to one another. *See* C.L. WILIBALD GRIMM, GRIMM'S WILKE'S CLAVIS NOVI TESTMENTI 11 (Joseph Henry Thayer trans., 1977) (1885).

[1282] Though these three themes of Scripture are here simply stated, much individual and creative discernment is necessary to fulfill these duties.

[1283] "Prudence, indeed, will dictate that Governments long established should not be changed for light or transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." THE DECLARATION OF INDEPENDENCE paras. 2 (U.S. 1776). The federal courts have even said that Grand Jury indictment of the innocent is one of the burdens of citizenship.

§ 4.7
Capital Trials & Due Process: Biblical Standards

To find that which a people considers its indispensable foundations, one need only learn what that people hold to be capital crimes. A nation or country will make behavior that strikes at what it considers its foundations capital offences. In America, the death penalty for premeditated murder is a vestige of our common-law ideal, recognizing that protection of human life is foundational to the survival of our country and that premeditated murder strikes at God by striking at the image of God in the one murdered.[1284]

Other nations, thinking themselves more enlightened and civilized, have condemned the United States because she allows the death penalty in cases of premeditated murder and certain other crimes. These other nations, however, also use the death penalty. For example, treason remains a capital crime among all nations in fact, if not in custom or law, and understandably so: one act of treason can betray an entire country into the hands of its enemy and enslavement. "Treason," says Justice Joseph Story, "is generally deemed the highest crime, which can be committed . . . ."[1285] Moreover, "if the crime of treason be indeterminate, that alone is sufficient to make any government to degenerate into arbitrary power."[1286]

Scriptural rights of due process of the accused in capital cases have been difficult to maintain, even in the common-law tradition. In 1695, Parliament recognized the right of legal counsel for the accused in cases of treason. Before that time, accused men stood trial for their lives before England's chief criminal court (King's Bench) and the Chivalry Court, without help of counsel.[1287]

[1284] *See generally Numbers* 35:30–34 (forbidding any other satisfaction in place of the death penalty for premeditated murder).

[1285] STORY, *supra* note 89, at 669.

[1286] *Id.*

[1287] From this custom arises our phrase *drumhead court*. General George Washington, to avoid arbitrary military standards at the forming of the Continental Army and the American Navy during the War of American Independence, adopted the English Articles of War as signed into law by King George III.—Congress carefully replaced any references to the English king. Today, non-military courts have jurisdiction to try an American military man for alleged crimes in violation of state law, if the military does not grab personal jurisdiction by convening a court martial (if the accused is a soldier) or a *captain's mast* (if the accused is a sailor or a marine), before state authorities arrest him or obtain an indictment or information. In either case, common-law leading principles apply.

American courts still fail to conduct capital cases meeting minimum biblical standards of due process,[1288] allowing conviction on mere confession of the accused—the weakest form of testimonial evidence—or by circumstantial evidence alone. Neither of these, however, meets the minimum standard of both Testaments of the Bible: the testimonies of two witnesses[1289] swearing to each material matter, i.e., required for conviction. By following standards of proof found in Scripture, courts will check and thwart wrongful prosecutions and resulting executions of the innocent. To this end, Scripture provides three procedural safeguards.

First, Scripture bars one's conviction solely upon one's confession. Designed to thwart conviction of the innocent, Christ sanctions this procedural safeguard; Scripture confirms it further; the Constitution recognizes it.[1290] In cases of treason against the United States,[1291] the Constitution bars conviction upon confession alone—unless the accused confesses in open court. Though centuries of common-law litigation have shown that confession is the weakest form of testimonial evidence, it has also shown that confession in open court is a reliable exception. The gravity of the courtroom setting and the holding fast to procedure and

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[1288] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1289] The *witness* is distinct from his *testimony* (witnessing). A "witness" has personal perception of a fact (knowledge), gotten through at least one of his five senses: he saw it with his eyes, heard it with his ears, touched it with his hands, smelled it with his nose, or tasted it with his tongue. In some cases, the feelings of his emotions in response to his sense perception are also relevant. His "testimony," on the other hand, is his oral affirmation of a fact (his expression of experiential knowledge), which he has perceived through at least one of his five senses. Thus, a "witness" is what one *is*; "testimony" (witnessing) is what one says, respecting one's experiential knowledge.

For example, Luke writes in *Acts* 1:8 that after the potency of the Holy Spirit is come upon the apostles, they shall be Christ's "corroborating testimony" (*μαρτυρες: martures*). The apostles were already witnesses because, through their senses, they each experienced corroborating facts concerning Christ, but Luke indicates that they had yet to give testimony. John the apostle also acknowledges this distinction between a witness and his testimony, "And [*δε: de*] you also [*και: kai*] *testify* [present imperative] . . ." *John* 15:27. A witness carries or bears personal knowledge gained by direct perception; his testifying is an unburdening of that knowledge by speaking.

[1290] See generally apps. 35, 38 of this book, for scriptural authority—direct and by inference—and further discussion of Scripture's requirements respecting testimonial evidence as these relate to threats of inquisitorial torture and swearing of oaths.

[1291] Treason against the United States (*see* U.S. CONST. art. III, § 3) is distinct from treason against one of the several States of the United States. Some States have inserted in their constitutions provision providing penalties for treason against that State. For example, even though John Brown led an assault on federal property at the Harper's Ferry engine house, Brown's 1859 trial and execution was for insurrection and treason against the State of Virginia.

fair play discourages confession. Open court in a common-law country has a less-oppressive atmosphere than inquisition and its one-sided manipulations. In short, confession in open court, if made without undue influence, is most likely of one's free will.

Second, Scripture demands that courts observe the right of appeal. Citing the scriptural right of mandatory appeal as a procedural safeguard in capital cases, Josephus states that the execution of Hezekiah was lawless because Israel's highest appellate court failed to review the case de novo[1292] before reaffirming the guilty verdict:

> For Herod, Antipater's son, hath slain Hezekiah . . . and hath thereby transgressed our law, which hath forbidden to slay any man, *even though he were a wicked man*, unless he had been first condemned to suffer death by the Sanhedrin . . . .[1293]

The Sanhedrin was Israel's highest appellate court and, thus, their court of last resort. Having right to sit in Jerusalem only, it held mandatory jurisdiction over capital cases; none of the four lower courts had authority to condemn to death.[1294] The many procedural safeguards the Sanhedrin required seem excessive, even to American sensibilities.[1295] One must remember, however, that American courts, by eroding common-law procedures in the interest of expediency, have also eroded American sensitivity:

> It has been worth our while to remark that none could be put to death in Judea but by the approbation of the Jewish Sanhedrin, there being an excellent provision in the law of Moses, that even in criminal cases, and particularly where life was concerned, an appeal should lie from the lesser councils of seven in the other cities, to the supreme council of seventy-one at Jerusalem; and this is exactly according to our Savior's words, when he says "It could not be that a

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[1292] *De novo* review requires the appellate court to review the record of the trial court without presumption, consideration of the trial court's rulings, or deference to it.

[1293] JOSEPHUS, THE ANTIQUITIES OF THE JEWS 376 (William Whiston trans., Hendrickson Publishers 1987) (c. A.D. 75), bk. 14, ch. 9, para. 3 (emphasis added).

[1294] See generally § 4.3 of this book (discussing the hierarchy of courts in first-century Israel).

[1295] See generally app. 24 of this book (discussing the Sanhedrin's disregard of due process—its criminal-law procedural safeguards—during the inquisition of Jesus Christ).

> prophet should perish out [*εξω* (*echo*): *clean* outside] of Jerusalem."[1296]

Only the Sanhedrin, sitting *in* Jerusalem, had final authority over capital cases. From the Babylonian exile through the first century, one will strive to find in Hebrew literature any record of an execution pursuant to the Law of Moses. This is likely due to the strict and effective procedural safeguards Scripture sets forth. The Bible establishes three fundamental safeguards of criminal procedure: open, oral, and public trial in the presence of one's accusers; freedom of defense for the accused, limited only by unnecessary repetition and cumulative evidence; procedural guards against the dangers of false testimony: a false witness (perjurer) was to suffer the same punishment his innocent victim faced due to the perjury.[1297]

Third, Scripture demands the accuser in a capital case to also be the initiating executioner.[1298] Each accuser also bearing the grisly responsibility of being a chief executioner discourages an accuser's perjured testimony. Because the accuser must also be a leading executioner, the accuser will be sure of the truth of his accusation, discouraging wrongful executions. If his accusation is false, he will lack the courage necessary to overcome the distaste of executing an innocent person; even if he does overcome his loathing and makes the false accusation, he knows he must live with the guilt of having murdered an innocent person.

In any event, requiring the accuser to also be the leading executioner, by casting the first stone, keeps him from resting in the notion that the judge by his sentence, or the Jury by its verdict, or the prison warden by his order, or the executioner by his act are the party responsible for the death of the accused. In truth, the entire responsibility rests upon each

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[1296] Translator's note *in* JOSEPHUS, THE ANTIQUITIES OF THE JEWS 376 (William Whiston trans., Hendrickson Publishers 1987) (c. A.D. 75), bk. 14, ch. 9, para. 3, *quoting Luke* 13:33. Cf. 1 *John* 4:18, where the apostle uses *εξω* (*echo*) in the same sense of a clear and clean exit: "Perfected love throws fear *clean out* . . . ."

[1297] *See, e.g., Deuteronomy* 19:16–19 (teaching that a criminal execution is lawful only where the accuser initiates the execution by throwing the first stone).

[1298] *See Deuteronomy* 17:5–7. See also generally *John* 8:1–11, for an example of overwhelming guilt keeping accusing witnesses from initiating an execution. In this instance, Christ set the accused free as *required* by biblical law. The law of God is balanced and merciful. Judgment must be executed in mercy. "[T]o execute judgment in mercy" is the duty of the common-law courts to the people. *See* 1 BLACKSTONE, *supra* note 12, at 229.

person in the process, including the accuser as initiator and finisher of the convicted man's doom.[1299]

Thus, the common-law tradition disallows those individuals involved in sending the one accused of murder to his execution to point to another in the criminal-law process (legislator, prosecutor, grand juror, judge, or petit juror) as the chief or only cause of the accused person's death. Rather, each person active in the process bears full responsibility for the outcome; because each prosecutor, each witness, each judge, and each juror is a necessary cog in the moving of justice, without which the execution will not occur. Thus, it behooves each one to insure that the government establishes guilt beyond any reasonable doubt, respecting each element of the crime of which the state accuses the defendant. Any single juror, therefore, must be willing to rest the welfare of that which is most important to him upon his decision for the guilt or innocence of the accused[1300] and resolve any doubt in favor of the accused.

§ 4.8
The Common-Law Right to Remain Silent

Those English men and women choosing to stand upon their common-law right[1301] to keep the privacy, peace, and integrity of their thoughts[1302]

[1299] It unscriptural for an accuser—whether judge, prosecutor, purported witnesses, grand juror, or petit juror—to accuse another of a capital offence in a detached and cavalier manner, believing their responsibility in the matter ends with the accusation; it does not. Individual judges, prosecutors, witnesses, and jurors shall answer to God for negligence, personal vengeance, or vindictiveness in decision to accuse.

[1300] In the writer's experience, courts allow counsel for the defense in closing argument to recite the *beyond a reasonable doubt* standard for criminal conviction, but judges will not always allow him to clearly illustrate and explain it. Since judges seldom fully inform jurors of the precise meaning of *proof beyond a reasonable doubt*—some call it proof beyond proof of *superproof*—and their powers as jurors, it is imperative that others set about to rightly and completely inform potential jurors of their authority and power before summoned to Jury duty. Rightly informed jurors are the indispensable foundation supporting our common-law freedoms. Conviction requires that the government prove guilt by ridding the mind of each juror of any doubt of the defendant's guilt beyond the appearance of guilt at first glance, i.e., upon the juror's first hearing the accusations against the defendant. Thus, if the juror holds a doubt of the defendant's guilt and that doubt is reasonable (possible), he must acquit. See generally § 5.1.10.3 of this book (defining guilt beyond a reasonable doubt as a standard of proof).

[1301] The *right* to remain silent, along with the remainder of the Bill of Rights, are rights and not mere privileges, as though one enjoys them only by state permission. God has inextricably bound up personal rights with each person's being. Privileges, on the other hand, are mere permissions given by men, and therefore, law entitles the giver, at his pleasure, to take them away. To our hurt, American courts are often sloppy with terms, calling *rights* "privileges" and calling *privileges* "rights," especially respecting the Fifth

have preserved for us the precious *right* to remain silent. These champions rooted their convictions not in subjective notions, but in objective revelation: the right to remain silent was a benefit, which men derive from their Creator as His creatures made in His image. As it is God's prerogative to reveal His mind and will only to whom, to what amount, and only when He desires, so also, individual men and women, as God's creatures made in His image, are to enjoy a like prerogative, subject only to God's sovereignty. The history of the Protestant struggle to remain silent—more than the history of any other—brings into focus the fundamental distinctions between the common law and civil law.[1303]

§ 4.8.1
Erosion of the Right to Remain Silent

The courts in the United States have eroded our right to remain silent under the Fifth Amendment.[1304] The courts, however, sometimes ignore the right or allow technical procedure to circumvent it. Often, by the time the accused, under the engine of the prosecutor's cross-examination,

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Amendment right to remain silent. Confusion of terms produces confusion of mind, making false law and oppressive government.

The battle for truth is in the mind; whether truth wins the mind or falsehoods subject the mind, the result will spread to others by words. Satan's first deception against mankind was akin to the confusion at Babel: a twisting of the common tongue or *speech* (שִׂפָה: *shafah*), not multiplication of languages. *See Genesis* 3:1, where Satan, playing the thespian, forms the opening of his deceptive language into an *a fortiori* argument, giving appearance of an element of surprise and indignant unbelief: אַף כִּי־אָמַר (*'aph key 'amar*)—*e.g.*, "God didn't say this *too* did He?" Satan opened his discourse with Eve as though his words were dependent upon something he had said previous, but he had said nothing. In an attempt to persuade Eve that God had burdened her with too many requirements, by innuendo, Satan referred to requirements God had never made.

Hebrew writers most often use this particular construction in poetry, not prose, because *a fortiori* arguments serve Hebrew poetry's parallel structures well, the second line building upon the previous line. *Proverbs* 11:31 uses the identical construction found in *Genesis* 3:1—אַף כִּי (*'aph key*)—in an *a fortiori* sense: "Look! The righteous shall be recompensed in the earth; *how much more* [*'aph key*] the wicked and sinning." God has chosen to reveal His mind and thoughts to men by words. Listening to right words is basic to right thoughts; right thoughts yield right behavior. For these reasons, God has committed even Himself to His keeping His Word.

[1302] *See generally* LEVY, *supra* note 712.

[1303] Though many were as brave, Nicholas Fuller, a common lawyer, and Freeborn John Lilburne, a former member of Oliver Cromwell's military staff, were two exemplary and colorful figures in the struggle for the right to remain silent. See generally §§ 3.7.9–3.7.10 of this book (discussing Nicholas Fuller and Freeborn John Lilburne).

[1304] In a 5–4 decision, the Supreme Court recently upheld a Nevada statute requiring that a person reveal his name upon the demand of law enforcement, further eroding the right to remain silent. *See* Hiibel v. The Sixth Judicial District Court, 542 U.S. 77 (2004).

demonstrates to the court's satisfaction that he is entitled to Fifth Amendment protection, he has, under compulsion, revealed enough information from his conscience to lead a passive Grand Jury to his indictment or a confused trial jury to his conviction.[1305]

The Fifth Amendment is the Founders' affirmation of the common-law right to remain silent, meant for the benefit of the innocent as well as the guilty. Nowadays, the right to remain silent is, in some respects, stronger in England than in the United States. In order to claim the right in England, the witness must simply refuse to take the stand; in order to claim the right in the federal courts of the United States, the witness must first demonstrate that he is in "real accusatory danger." By the time he accomplishes that task to the court's arbitrary satisfaction, however, a good bit of what he considers protected by the Fifth Amendment will stand exposed. Then, if the witness will assert his right to remain silent, he must nevertheless take the stand, submit to an oath, and respond to each question asked with words invoking of the right. A general refusal to speak at all—called a blanket Fifth—gives grounds for the court to hold the witness in contempt; whereupon the court may, in its discretion, jail the witness until he provides the desired information—called the jail-house key.

The right to remain silent stems from the Creator having made each man and woman in His image. Just as the Creator only reveals Himself to men when, how, and to what extent pleases Him, the common law never obligates men—being products of God's righteous imagination—to reveal information concerning themselves to any other, except to the extent that others have a God-given right to such particular information. One does well to search the Scriptures to determine what God requires respecting not only one's responsibility to speak when the state commands silence (freedom of speech), but also, just as important, one's responsibility to

[1305] The writer once discussed with a local county prosecutor his client's Fifth Amendment defenses before a federal court. The prosecutor chuckled, "In federal court a fellow no longer has any rights, except the right to trial by jury, and that doesn't amount to much: even if you get the Jury empanelled, they'll figure your man guilty from the start because being accused makes a fellow look guilty." The common law charges the juror with preservation of common-law rights; but if a common-law mindset—truly presuming that the accused is innocent until the government proves each individual element of the crime charged against him beyond a reasonable doubt—does not hold jurors, neither the innocent nor the guilty will enjoy their God-given rights. Indictment of the innocent for crimes, says the Supreme Court, is an unfortunate burden of American citizenship. For this reason, our courts have repeatedly held that the right to remain silent is for the benefit of the innocent as well as the guilty.

remain silent when the state commands one to speak (right to remain silent).[1306]

The common-law right to remain silent embraces no right to lie. With certain exceptions Scripture sets forth, if one chooses to speak, law obligates one to speak truth.[1307] Understanding the right to remain silent is also vital because if a person chooses to speak truth, but that truth which he speaks displeases the state, he risks prosecution for obstruction of justice or perjury, if he spoke the words in question under oath.

The trite refrain, "If you have nothing to hide, you will never be afraid to speak," is bad advice for two reasons: *first*, sometimes God desires silence nonetheless; *second*, government prosecutors are adept at twisting innocent, and even exonerating, words against the speaker.[1308] Regardless of the innocence of the content of one's speech, the speaker must expect that the government will twist against him all that he says. The Fifth Amendment confirms the Framers' conviction that spoken truth can draw the ire of the state and danger of prosecution, just as often as does speaking a lie.

Sometimes it is God's will that one remain silent; at other times, it is God's will that one speak. In either event, history is clear: many, in obedience to God's will, have died for exercising the right to free speech, speaking the truth; many others, in obedience to God's will, have died for exercising the right to remain silent, forbearing to speak.[1309] The

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[1306] *See generally* CORRIE TEN BOOM, THE HIDING PLACE (1971) (recounting practical examples of this truth, while living under the iron hand of Nazi statism). The principle here is simple: no one is obligated to reveal information to another unless God has given that other person the right to such information. The application of this principle in particular instances, however, is not always easy because one must determine whether God has granted such right in a given instance.

[1307] Some cases in Scripture appear to be exceptions to this rule. Those situations and cases that theologians and courts label as exceptions, however, are often not exceptions at all. The apparent exceptions to the rule of truthfulness by case example in Scripture demand examination: instances that never erode but establish the rule requiring truthfulness. "The exception to the rule," said Bacon, "establishes the rule, in cases not accepted." *See, e.g., Exodus* 1:15–21, 3:18, 22, 12:36, *Joshua* 2:1–24, 1 *Samuel* 29:1, *Acts* 23:6. A full discussion of this issue is beyond the author's present purpose. It is enough to know, however, that in order to be lawful, the so-called exception to any rule must "vindicate the old one [rule] from misrepresentation." 1 BLACKSTONE, *supra* note 12, at 70.

[1308] "If you can bear to watch the words you've spoken," wrote Kipling, "twisted by knaves to make a trap for fools . . . ."

[1309] On the other hand, neither Scripture nor the common law commands anyone to seek his own death by speaking the truth. To seek death for doing right is morbid—even sordid; it is unchristian. Preoccupation with one's personal martyrdom is to live in a culture of death and not life. Christianity cultivates of life.

John Wyclif, upon noticing that some of his students were preoccupied with their own martyrdom as a path to salvation, exhorted them to never seek a martyr's crown, but rather,

common law's freedom of speech and right to remain silent acknowledge and protect one's choice to speak and one's choice to remain silent, as God informs and directs one's conscience.

§ 4.8.2
Scripture & Being Slow to Speak

Scripture is clear: if a person can control his tongue, he can control his entire body.[1310] Scripture often exhorts men to be of few words,[1311] zealous of silence,[1312] and slow to speak,[1313] calling such oral restraint prudent.[1314] Further, Scripture balances these warnings to be of few words with two demands: the believer is to be always prepared with a cogent explanation for his Christian hope; the preacher is to always teach God's Word.[1315] Yet, even with these demands, Christ admonishes to never cast pearls before swine.[1316]

The sum of evidence from Scripture demands prudent restraint of speech and even a non-anxiousness to speak[1317] because each person will answer for unnecessary words.[1318] In addition, Scripture lays upon the

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declare the Scriptures; and if God wills, he told them, martyrdom will find you soon enough. Those in Christ Jesus will suffer persecution, but Scripture nowhere commands any to seek persecution. James Christian observes that by the second century A.D., men and women were seeking Christian salvation through martyrdom; by the third century, they were seeking salvation through baptism. Salvation, however, is only by Christ: sufficient for all, but efficient for His own.

[1310] *See James* 3:1–18. Knowing when not to speak, when to speak, and what to speak is the mark of a perfected man. *See James* 3:2 (*ουτος τελειος ανηρ*: by the letters, "this perfect man").

[1311] *See Proverbs* 10:19, *Ecclesiastes* 5:1–2.

[1312] *See* 1 *Timothy* 4:11, *Psalm* 46:10.

[1313] *See James* 1:19.

[1314] *See Proverbs* 12:23.

[1315] *See* 1 *Peter* 3:15, 2 *Timothy* 4:2, *Romans* 1:15.

[1316] *See Matthew* 7:6.

[1317] *See James* 1:26, 3:5–8, 1 *Peter* 3:10.

[1318] *See Matthew* 12:36. Moreover, excessive words are little heard. Concerning closing arguments before the Jury, some American trial lawyers borrow an old saying of American preachers: *no souls saved after 30 minutes*. Thus also the saying: *speak little, heard often; speak often, heard little*. Having heard hundreds of lawyers argue their causes before him, Justice Story concluded that above all, shortness of speech is a "first great precept" of winning one's cause:

> Be brief, be pointed, let your matter stand:
> Lucid, in order, solid and at hand.
> Spend not your words on trifles, but condense:
> Strike with mass of thoughts, not drops of sense.
> Press to the close with vigor, once begun;

holder of information the responsibility to determine whether another has a lawful right to that information. "A prudent man," says Solomon, "conceals knowledge . . . ."[1319] Only one's Creator has an absolute right to one's innermost thoughts and desires.[1320] To insist otherwise is priestcraft and forms the foundation of the civil law's inquisitional character.

§ 4.9
Common-Law Outlawry

Outlawry . . . is the sentence of death pronounced by a community which has no police constables or professional hangmen. To pursue the outlaw and knock him on the head as though he were a wild beast is the right and duty of every law abiding man.[1321]

Leave—hard the task!—leave off, when done.

He who draws a labored length of reasoning out,
Puts straws in lines for winds to whirl about.
He who tells a tedious tale of learning o'er,
Counts but sands on ocean's boundless shore.
Victory if gained, is gained by battles fought,
Not by the numbers, but by the forces brought.

What boots success in skirmish or in fray,
If rout or ruin, following close the day,
What worth a hundred posts, all maintained with skill,
If these all held, the foe is victor still.

He who would win his cause, with power must frame,
Points of support and look with steady aim—
Attack their weak points, defend your strong with art;
Strike but few blows, but strike them to the heart.
All scattered fires but end in smoke and noise:
The scorn of men, the idle play of boys.

Keep then this first great precept ever near:
Short be your speech, your matter strong and clear;
Earnest your manner, warm and rich your style,
Severe in taste, but full of grace the while.
And you will reach the loftiest heights of fame,
And leave when life is past, a deathless name.

GEORGE ROSSMAN, ADVOCACY AND THE KING'S ENGLISH v (1960), *quoting* Justice Joseph Story.

[1319] *Proverbs* 12:20.

[1320] *See Westminster Confession of Faith*, ch. 20, sec. II.

[1321] 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I. 476 (2d ed. 1898).

Common-law's ancient teaching called *outlawry* supplies a striking picture of Christ's doctrine of the new birth and new identity, demonstrating the common law's Christian character. The declaration of outlawry against a man placed him outside the protection of the common law. Moreover, to try to protect such a man was unlawful; thus, the common law called that one outside its pale, an *outlaw*.

The outlaw is akin to the man in his trespasses and sins against God, without Christ and His law's protection, and under the final sentence of death. Likewise, the only escape the common law afforded from outlawry's deplorable condition was a pardon, which brought, by operation of the common law, official forensic death to the former self of the outlaw. His former identity before pardon was that of a criminal, which the common law refused to protect and only condemned; his status was as that of an unreasoning beast, good for nothing, except to be caught and killed.[1322]

According to the ancient common law, the outlaw being no more than a wild beast, his head was worth no more than that of a wolf, for which a bounty was paid. Thus, the Anglo-Saxons and Danes called the outlaw *woolferthfod*: one bearing (upon his neck) a wolf's head; thus, any finding him has right, and even duty, to slay him.

As is the condemned sinner before God, the outlaw stood condemned in judgment, without possibility of appeal, and faced sure death.[1323] Thus, in that identity, he stood irretrievably ruined; though still alive, the law reckoned him dead. Therefore, to enter the common law's protection, he must do so with a new identity. Only one greater than he, however, could cancel his former identity: only the king's pardon ended recognition of the outlaw's former identity as a *woolferthfod*. Pardon, then, was never a reformation of the outlaw's old identity, but a discarding of it as dead and

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[1322] *Αλογια ζωα: alogia zoa*. *See* 2 *Peter* 2:12, *Jude* 10. Peter's phrase describing the lustful is akin to Galen's phrase describing professional Greek athletes. Devoting six chapters of his *Προτρεπτικος Λογος* to warning young men against devoting themselves to athletics, he attempts too show that professional athletes are as swine, brutish (Peter's and Jude's *αλογια: alogia*), with bodies serviceable only for a few useless games, but unfit for useful activities: the rigors of war and farming. Galen concludes that because athletes are wretched in their lives, men rightly call them *αθλιοι* (*athlioi: wretched ones*; English, "athletes"). *See* 2 A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 240 (William Smith, William Wayte, G.E. Marindin eds., London, John Murry 1891). Peter says such men have before them—as the outlaw—only destruction.

[1323] In the earliest recorded reference to outlawry, Cain responds with the Semitic comparative: "My sin [עוֹן (*a-oh-nee*): embraces crime, guilt, and punishment] is *greater* than can be lifted off [מנשוא (*men-showa*): i.e., forgiven]." *Genesis* 4:13–14.

a bringing of him, as though a newborn child, into the common law's protection.

A pardon's official reckoning of death did in legal contemplation that which death does regarding any other person: it cancelled all former legal relationships, benefits and burdens, rights and responsibilities.[1324] Consequently, the pardoned outlaw's former advantages—title held in property, titles of nobility, positions held, or status achieved—were unavailing for his advantage or pardon because they were evidences of his former guilty identity, which the law could only condemn. Moreover, the pardon cancelled not only the advantages of all former relationships, such as all contingent and vested inheritance rights, but also the disadvantages of all unfavorable relationships, such as debt.[1325]

At his pardon, therefore, the former outlaw entered the world as a newborn babe: naked, without former possessions, inheritance rights, titles, academic degrees, debts or obligations. That which he had received from his ancestors as a child of Adam, whether good or bad, was no more. Thus, the pardoned outlaw and the new Christian were alike: "If any person is in Christ," Paul writes, "he is a new kind of creature. Old

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[1324] *See generally Romans* 7:2–3 (showing that one's rights and responsibilities stemming from one's legal relationships cease upon one's death).

[1325] Scripture teaches that at the new birth, one's past—both good (benefits accumulated) and bad (burdens incurred)—becomes irrelevant to one's relationship with God. Nothing from one's past will commend a person to God because any good a person has accomplished is not good enough. Lying upon his deathbed, Alexander Maclaren's eyes fell shut and he began to softly groan. His assistant sitting by asked, "What is the matter Maclaren?" Maclaren responded that he envisioned himself on a sinking ship, throwing overboard all his bad deeds. Then, after a short silence, Maclaren said that he now envisioned himself throwing overboard all his *good deeds*. Maclaren then said that his ship was sinking fast, and he was prepared to swim to glory, holding onto the plank of God's great grace.

Likewise was John Knox's experience. Tradition says that during his last hours, with his family and secretary Bannatyne gathered 'round, Knox told them that the devil is an accuser and was reminding Knox of all his sins. After a short silence, Knox then told them that the devil is *worse* than an accuser, he is a scoundrel, now putting the evil notion into Knox's head that all of the good things that Knox had done in life will commend him to God. Knox knew that both of these are lies because God does not bring about the new birth, forgiveness of sins, and justification based on one's past doings, good or bad; rather, the new birth, forgiveness of sin, and justification rests upon the finished work of Christ, to which no man can contribute, compliment, or otherwise improve upon.

Christ's work is perfect in the sense that He has *perfected* it. As the recording of a deed at the courthouse legally perfects a real-property transaction, leaving nothing more that one can do to make one's ownership any surer; the record of His Word leaves nothing more that anyone can do to render Christ's work of redemption any more complete and binding. English distinguishes the adjective *pèrfect* (accented on the first syllable) from the verb "perfèct" (accented on the second syllable) by transferring the accent from the first syllable of the adjective to the last syllable for the verb. Thus, that which is perfect is that which someone has perfected.

things have passed away; ponder—he is a new *kind*."[1326] Moreover, Paul reckons the titles and status of the old identity to be of no more worth than a pile of waste.[1327]

As did a pardon from common-law outlawry, Christ cancels a man's old identity in Adam and starts him afresh with a new and different identity in Christ. Every bad thing that condemns and every humanly good thing, upon which a fellow is tempted to place his reliance for his future and reputation, is forever gone. Further, in legal perfection of his new position, God certifies his fresh identity with a certificate[1328] of his new birth and other evidences in the promises of Scripture.

In past times, in addition to their newborn's surname, parents gave their child two more names in faith that the child, having just experienced physical birth, shall one day experience spiritual birth.[1329] The child's first name applied to his physical birth; the child's middle name, however, was to apply to his new spiritual identity as a Christian. As *Abram* (father) became *Abraham* (father of a multitude), *Jacob* (supplanter or chiseler) became *Israel* (wrestler with God), *Saul* (to ask) became *Paul* (small), and *Simon* (wishy-washy) became *Peter* (rock); so also, parents gave their child a Christian name. Christ came not to make bad men good, but to make dead men live with a new identity, that they have life more abundant.

Civil Law Has Nothing Like Common-Law Outlawry

The civil-law doctrines *consecratio capitis* (consecrated to the gods to be killed on sight, abbreviated *sacer*) and *capitis deminutio* (reduction or diminution of status) are both incomparable to the common-law principle of outlawry because neither of these doctrines allow for escape from their debilitations by deeming a new person to have been born again with a new identity. Rather, both doctrines merely destroyed certain rights linked to one's legal status, never allowing any meaningful replacement. In short, *capitis deminutio* ended a person's *caput* (legal standing), putting a lower status in its place: *e.g.*, reducing a Roman citizen to a non-citizen or a freeman to a slave. Sometimes *consecratio capitis* removed without remedy all human status, deeming a man an unreasoning beast, good for nothing but to be caught and killed. Unlike

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[1326] 2 *Corinthians* 5:17 (emphasis added).

[1327] *See Philippians* 3:8.

[1328] *See* 1 *John* 5:1–3.

[1329] *See John* 3:3, 7: *αναγεννεω* (*anagenneo*), meaning both "born from above" and "born again," each meaning complimenting the other.

common-law outlawry, however, neither *consecratio capitis* nor *capitis deminutio* offered possibility of pardon, new identity, or better legal status. These Roman dogmas allowed neither reversals nor remedies.

§ 4.10
Common Law's Accord with Scripture

The moral law does forever bind all, as well justified persons as others, to the obedience thereof; and that, not only in regard of the matter contained in it, but also in respect of the authority of God the Creator, who gave it. Neither does Christ, in the Gospel, any way dissolve, but much strengthens this obligation.[1330]

Because the common-law tradition shares its first principles with Scripture, it is consonant with scriptural faith.[1331] These precepts held in common have resulted from three providential developments. *First*, the common law is the immediate product of man's divinely implanted (albeit fallen) capability to recognize and initiate right ideals of law and government. From this capability, the Anglo-Saxon tribes, even in their

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[1330] *Westminster Confession of Faith*, ch. 19, secs. I, IV.

[1331] Jude defines scriptural faith with, "the *once*-delivered-to-the-saints faith" *Jude* 4. the Greek term '*απαξ* (*hapax*), rendered "once" in this verse, denotes a single occurrence that perfects the purpose intended by the deliverer. Jude refers to the delivery of the Scripture's testimony as the perfecting of all that Christ has done. The saints to which Jude writes are those of like faith that holds the Scriptures as did Peter the apostle: accurate and more-reliable than even the audible voice God out of heaven. Divine illumination enlightens the mind to the revelation given, but revelation beyond the sure Word of God written the written Word adds nothing. Jude's term *hapax* is as the Latin *semel*: that which is done so as to be of perpetual validity and never in need of repetition, i.e., "once for all." C.L. WILIBALD GRIMM, GRIMM'S WILKE'S CLAVIS NOVI TESTMENTI 54 (Joseph Henry Thayer trans., 1977) (1885). Wrote John Rippon, "What more can He said than to you He has said, You, who to for refuge to Jesus have fled?"

In 2 *Peter* 1:19, by using the comparative *βεβαιοτερον* (*bebaioteron*: better tested, proven, certified, and therefore, more reliable), Peter, does not mean that the audible voice of God the Father, which he heard from heaven, was not reliable. He is asserting, however, that the Bible is *more* reliable than any perceived audible voice of God, including the voice of God the Father he heard from heaven.

The noun form *βεβαιος* (*bebaios*: technical legal term denoting an enforceable guarantee), the verb form *βεβαιοω* (*bebaiao*), the participle form *βεβαιοσις* (*bebaiosis*: denoting execution of the guarantee), and the agency form *βεβαιωτης* (*bebaiotays*) are commonly used in the ancient papyri and inscriptions only in the juristic, forensic, and technical sense, referencing a legally binding statement guaranteeing security. *See, e.g., Romans* 4:16, 2 *Corinthians* 1:7, *Hebrews* 6:18. At root, the term denotes forensic certification: a guarantee the courts will enforce. The Bible, says Peter, is the legally binding *certification* of all other purported expressions of truth. God will forensically vindicate the reliability of His Word in His judgment by enforcing its provisions. See generally app. 23 of this book and accompanying notes, for further explanations and proofs concerning the reliability of the Scriptures.

natural and pagan state, developed customs and procedures of government calculated to preserve family autonomy and individual freedom. *Second*, for centuries, beginning during King Kenwalk's administration (A.D. 643–672) and magnified during King Alfred's (A.D. 871–899), the Scriptures have nurtured the common-law tradition. The Word of God provided a steady foundation for the common law. *Third*, during the years of the Scripture's establishment as the common law's foundation, the common law enjoyed Britain's insular isolation, keeping full and direct force of the civil law's contrary sway from the Island. Though the encroachments from the continent of the civil law upon the common law were persistent, the foundation of Scripture gave it stability.

Through the centuries, wherever the ideals of the common law have arisen through man's divinely endowed natural ability to recognize them, Babylonish imperial systems have tried to subvert these ideals. Even though men and governments have never practiced the common law's ideals in purity, knowledge of these ideals has inspired men to pursue them with great blessing. Following are examples of common-law ideals consonant with Scripture.

First, Scripture and the common law stress, foremost, facts. In both traditions, proof of facts must precede all else; thus, reliable evidence forms the foundation of all understanding, interpretation, and application of truth. For example, Scripture sets forth the foundation of the Christian faith by the four testimonies of the Evangelists, concerning the birth, life death, burial, and resurrection of Jesus Christ. "This," writes John, "is the witness of God that he has testified of his Son . . . the record that God gave of His Son; and this is the record, that God has given to us eternal life and this life is in His Son."[1332]

Scripture is foremost a record of facts in evidence, forming the foundation upon which truth rests. Scripture, then, is no mere treatise of philosophy presented through a paragon of logic. Its order is first, facts of history, upon which rest conclusions for action. For example, the first five writings of the Old Testament lay the foundation of historical fact and law for the rest of the Old Testament; the first five writings of the New Testament, the four Gospel testimonies and the Book of Acts, lay the foundation of historical fact for the rest of the New Testament, without which it is meaningless.

Likewise, the common-law tradition requires first, a foundation of facts; trials are about finding the facts of the case. Moreover, in common-

[1332] 1 *John* 5:9–11.

law courts, no evidence is allowed unless a foundation of fact for its admission into evidence is first made. Further, no court action is valid unless facts are shown proving that due process has been followed or waived. Both the tradition of Scripture and of the common-law are concrete, loathing theory, guesswork, and speculation.

Second, both traditions,[1333] to insure clarity and permanence, put covenants—also called constitutions, declarations, charters, and leagues—in writings that restrict the power of government by defining its jurisdictional limits.[1334]

Third, both traditions subject the lawgiver and administrator to the laws they dispense and administer. God, through Scripture, has set the example in this regard, choosing to subject Himself to all of His law: God keeps His promises and never violates His Word.[1335] So also, the common-law tradition places all men alike, of high station and low, under its standards. Scripture and the common law each establish a government of laws above all persons, exempting no one.

Fourth, both traditions hold the true expression of law to be tantamount to the person of God Himself.[1336]

[1333] See generally § 1.1 of this book, at para. 1 and accompanying note (explaining the term *tradition* (*παραδοσις: paradosis*) as used by Scripture).

[1334] *See, e.g., Exodus* ch. 20, *Deuteronomy* chs. 1, 5–8, *John* 19:11, 1 *John* 5:11–13, *Nehemiah* 9:36–10:9. "And in all this we *cut permanent* [כרתים אמנה: *ca-rath-im am-nah*, "cut a stone," i.e., engraved] and are writing." Though good Hebrew, translating this phrase by the letters makes for clumsy English. At bottom, by writing this covenant in stone, the author intends its provisions for keeps. *Id.* at 9:38. *See also e.g.*, Alfred the Great's *Dombec* (*circa* A.D. 875), the affirmation by William I. of the *Laws of Edward the Confessor* (1066), Magna Carta (1215, reissue 1225), John Wyclif's *De Officio Regis* and *Speculum Secularium Dominorum* (circa 1377), John Fortescue's *De Laudibus Legum Angliae* (*In Praise of English Law*) (1471), the Mayflower Compact (1620), the Petition of Right (1628), the National Covenant (1638), the Solemn League and Covenant (1643), the Habeas Corpus Act (1679), the English Bill of Rights (1689), the American Declaration of Independence (1776), and the American Constitution (1781). *See in addition* the American colonial charters and present American state constitutions. See generally app. 7 of this book, for further examples. Such covenants are *undertakings* or commitments, holding in common that God alone has limitless (true) sovereignty.

[1335] See generally app. 19 of this book (discussing God's voluntary subjection to his own Word by placing His Word above all that He is, as stated in *Psalm* 138:2). This said in awareness of Kierkegaard's suggestion that the narrative of *Genesis* 22:1–14 is an example of God's suspension of the ethical. *See generally* SØREN KIERKEGAARD, FEAR AND TREMBLING & THE SICKNESS UNTO DEATH (1954) (1843) (discussing Kierkegaard's discussion of Abraham's attempted sacrifice of his son Isaac as a teleological suspension of the ethical, that is, social norms). Kierkegaard recognized Abraham's duty to esteem God's commands higher than his duty to social norms and to obey God's commands by faith.

[1336] See generally app. 19 (discussing the Word of God as God's law and being tantamount to the person of God, in light of *John* 1:1 and *Psalm* 138:2).

Fifth, both traditions hold that distinctions of right and wrong are the gist of *law* and that these distinctions are eternal because law is the expression of God's timeless character.[1337] God's law given on Mount Sinai, said Greenleaf, was merely "declaratory of what had been well understood at the beginning . . . ." The traditional common law has understood the acts of legislators and findings of courts to be fresh expressions of what man has always been able to discover. The law and the truth, therefore, never change; the common law, however, expresses, re-expresses, and further articulates the law in new contexts with ever-keener distinctions and ever-finer applications.

The divine eternality of law is discernable in Scripture. For example, Jehoshophat admonished Israel's judges, "Take heed what you do, because you do not judge for mankind, but for the LORD, also judging in the matter with you."[1338] As were also all the prophets after Moses, King Jehoshophat was a student of Scripture, enlarging the application of the

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[1337] Most often, God chooses to convey his eternality by the Hebrew term עלם (*'olam*): meaning, *to the vanishing point* (the point where parallel lines receding from the observer seem to come together) into both the past and the future. In order to communicate to man, the Creator condescends to human language. Language, however, is limited in what it can convey. Yet, God uses human language, choosing the terms He knows will convey as much as He desires man to know. Scripture uses *'olam* as an attributive with אל (*'el*) to designate the LORD: אל עלם (*'el 'olam*). *See Genesis* 21:33. Scripture does not confine the meaning of *'olam* to the future: at least twenty times, *'olam* refers to the past. *'Olam* signifies an undefined length of time extending into the past or the future, or both. Barr concludes, "We might therefore best state the 'basic meaning' as a kind of range between 'remotest time' and 'perpetuity'." J. BARR, *Biblical Words for Time*, THEOLOGISCHES HANDBUCH ZUM ALTEN TESTAMENT 73 (1969).

Hebraist Richard Rigsby, recognizing the limitation of human tongues to express the *quality* of eternality in a single term, insists that *'olam* denotes that definitive point called the vanishing point, but further acknowledges that *'olam* points to a greater and undefined extension beyond that vanishing point. Rigsby's definition of *'olam* is expressive with the concept of eternality as conveyed by the New Testament Greek term *αιωνιος* (*aionias*: time as a never ending persistent movement, but not as length). Used as an attributive with *ζωη* (*zoay*: life as a quality and not as a length of time), *aionias* magnifies the meaning of God's life. The eternal life of Scripture is, therefore, a quality of life, not a length of life measured in time. In the same sense, the eternality of God is a *quality* of being, not a quantity of time.

Any activity contrary to *God's character* is transgression of God's law and, thus, trespasses upon the dignity of God's person, termed at common law a *violation of God's Peace*. Over time, the common law confined the possibility of violation of God's Peace to the times of cessation of litigation between the terms of court and on Sundays.

[1338] 2 *Chronicles* 19:6. Fortescue freely paraphrases, *Et iudicum omnium sentencias, Iosaphat asseruit, esse iudicia Dei* (All judicial sentences, asserted Jehoshaphat, are the sentences of God). The Hebrew text is unambiguous. Fortescue's paraphrase, although loose, captures the aspect of the text he wishes to emphasize. *See* FORTESCUE, *supra* note 59, at 22, 24. At the time of this admonition, Chancellor Fortescue, Henry VI., and Henry's son Edward had all fled to France in exile for their conviction of common-law principles.

first principles God set forth by Moses' writings. The Hebrew prophets affirmed and reaffirmed the writings of Moses as the eternal established standard of the Creator; moreover, Christ certified this divine principle of ongoing affirmation of the divine standards, declaring, "I did not come to destroy the law, but to fulfill . . . ."[1339]

Likewise, through the centuries, men of note have affirmed and reaffirmed the common-law tradition: Alfred the Great, King Edward the Confessor, William I., King John (Magna Carta), John Wyclif, John Fortescue, Parliament (*e.g.*, Petition of Right, Habeas Corpus Act, English Bill of Rights), and the American Founders (*e.g.*, Declaration of Independence and the Constitution). Reaffirmation of the *old paths*[1340] is a necessary element of both the Christian life and the common-law tradition. For example, the Fourth Amendment, said Justice Story, "is little more than the affirmance of a great constitutional doctrine of the common law." By contrast, the civil law is an ever-emerging child of rebellion against the past.[1341]

Sixth, both Scripture and the common law teach that since law is timeless (without an ascertainable beginning or ending) it can never be the duty of the legislator or court to create law. Rather, the legislator is to discover and declare law; the court is to discern, articulate, and apply the law to the particular circumstances brought before them, case by case. Just as the reformers held that the Word of God has always existed, so also, the common law has always existed. The common law is merely man's discernment of the processes best calculated to render up the true application of God's standard in particular instances. Lord Coke captured the concept, "A new judgment does not make a new right, but declares the old because adjudication is the declaration of a right, and through adjudication the right that has long been hidden is revealed anew."[1342] In a common-law country, rights suppressed by complacency of the people

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[1339] *Matthew* 5:17.

[1340] *See Jeremiah* 6:16:

> Thus said the LORD, "All of you stand upon the road and see, then ask for the eternal [עלם (*'olam*): the never-ending and unchanging paths extending as far as you can see into the past and into the future] paths: 'Where is the good way?' Then walk in it and find rest to your souls."

The eternal paths are the unchanging and eternal standards (law) of God.

[1341] See generally § 5.1.6 of this book (discussing civil-law's utopian fantasy and its ever-present handmaiden, rebellion).

[1342] *Novum judicium non dat novum jus, sed declaret atiquum [sic]; quia judicium est juris dictum, et per judicium jus est noviter revelatum quod diu fuit velatum.*

and callousness of their government will surface in the boiling crucibles of the common-law courts.

Seventh, in both traditions, rights and responsibilities are revealed foremost out of personal relationships and not from the state's decrees. In contrast with the civil law, the central idea of Scripture and the common law is relationships. The Christian, for example, will know, understand, and experience his rights and responsibilities only through his relationship as a son of God the Father. The written covenants of Scripture further define his rights and responsibilities toward all others by his father-son relationship with God.[1343]

So also the common-law tradition, which, above all else, is relational: one understands, experiences, and knows its precepts only as these bob forth from relationships. Indeed, once a legal dispute arises, the common law's threshold and controlling question is what kind of relationship is between the parties: *e.g.*, husband and wife, father and son, ancestor and heir, master and servant, principal and agent, promissor and promisee, settlor and trustee, settlor and beneficiary, bailor and bailee, inviter and invitee, or landlord and tenant? Once one determines the kind of relationship between the parties, rights and responsibilities come clear.[1344]

[1343] God's Word is His standard or law (*torah*), providing personal guidance to the one God has redeemed and brought into His covenant relationship. The Bible is a series of God's renewals of and expanding revelation concerning His covenants with His people. For example, "Deuteronomy is a renewal of the covenant relationship established . . . ." SAMUEL J. SCHULTZ, DEUTERONOMY 14 (1971). God's law is foremost personal and relational, as is the common-law tradition. A man's life consists not in the abundance of material things, but rather, in relationships ordered aright: both with God and with other men. Man does not live by bread only; relationships are God's avenue for providing man with the material provisions necessary to sustain life and enable obedience to authority. For example, without a relationship with the Giver of all *good things* (including bread), man perishes. *See Deuteronomy* 8:3; *Matthew* 4:4; *Luke* 4:4.

Likewise, on the human plane, it is through relationships with one's fellow man that God provides material things—the *means* of life. *See Luke* 12:15. God intends every aspect of His Word or law to make better the individual's relationship with God and with others. Most fundamentally, the gospel message—that Christ gave his life to pay the capital penalty for our sins—is to restore and establish the proper relationship between the one accepting this remedy and the Creator.

The economic well being of men and nations depends upon freedom of association and relationships rightly maintained. In this ideal, the common-law tradition is consonant with God's Word. Only by discerning the kind of relationship that exists between oneself and another will that one know one's rights and duties respecting his fellow.

[1344] See generally 4.1.5.2 of this book (discussing the focus of civil law upon effectuating the will of the state and its consequent neglect of due process).

Eighth, both Scripture and the common law teach that law is for the benefit of man and not man for the benefit of the law.[1345] God never meant the law to hinder, dominate, and enslave. Rather, both Scripture and the common law intend the law to protect, motivate, and encourage: a shield against the blows of the lawless and a sword for the restraint of the wicked. Whether used as shield or sword, the law is for protection of man's freedom to associate, speak, and act or to forbear from these.

Ninth, both traditions hold that self-control enables, and law confirms, freedom. Without personal self-control (one's government of one's self), law will ever more demand bureaucratic control and state intrusion into family, personal, and business relationships.

Tenth, both traditions deny that any man or faction of men is the sole and direct recipient of God's authority, whereby to rule others in this present world. Wyclif recognized the common law's accord with Scripture on this point, moving him to demand that Oxford replace teaching of the civil law with teaching of the common law. Wyclif saw that the common-law tradition followed Scripture, being intolerant of the insertion of any man, or combinations thereof, between any individual and God the Father—save the God-man, Christ. The common law, he understood aright, will break the power of priestcraft over his countrymen.

Wyclif further saw that teaching of common law will supplant Justinian's Code as the standard in the courts and weaken the use of the canon law in the English Church, allowing the Word of God written to become the Church's rightful standard for faith and practice. As the unchanging Word of Christ replaces the imperious breath of arbitrary priests, taught Wyclif, the notion of Rome's mediating priests in place of Christ will offend and drive the individual from dependence on other men—whether of the state or of the priesthood—to direct dependence upon Christ. In turn, such dependence (faith) upon God alone will encourage individual responsibility, empower individual freedom of conscience, and ditch the baggage of Babylonian trappings—such as the confessional.

Eleventh, both traditions teach that there are three distinct and separate powers of government. The common law calls them legislative, judicial, and executive; Scripture calls them prophet, priest, and king.

[1345] *See, e.g., Mark* 2:27: "The Sabbath was made for the sake of man, and not man for the sake of the Sabbath." Beginning with creation, the LORD organized His precepts around the Sabbath days and years; non-observance of the Sabbath was a capital crime. Nonetheless, man is not to serve the Sabbath, but is to serve the LORD of the Sabbath by recognizing His truth, accepting Christ's remedy, and, thereby, entering His Sabbath rest. *See Hebrews* 4:1–11.

According to Scripture, the prophet's office is akin to the common law's legislative branch: the exercise of free speech in delivering God's Word to men. Further, the priest's office is akin to the common law's judicial branch: the exercise of discernment in application of God's standard in particular cases by oracular persuasion. Finally, the king's office is akin to the executive branch: the duty to enforce God's standard.

The American Declaration of Independence acknowledges that the three branches of government stem from the Creator.[1346] Further, both the common law and the Constitution distinguish between the judicial, the executive, and the legislative branches—placing even additional barriers against executive and legislative control of the judicial branch. Neither the common law nor the Constitution, however, allows the executive or the legislative powers to stop the courts' from influencing government by silencing the judicial power.

Both the Word of God written and the common-law tradition distinguish these three independent and coequal offices: separate branches springing from the common root of divine authority, each having a separate jurisdiction, which complements and limits the other two branches.[1347]

Twelfth, both Scripture and the common law hold that during this age of man's administration of law and government, mere men are never to lodge the three powers of government—legislative, judicial, and executive—at the same time in the same man or any single faction of men of a single will.[1348]

[1346] The American Declaration of Independence acknowledges God to be holder and fountain of the three powers of government: legislator of His laws (*the Laws of Nature and of Nature's God*), enforcer of His laws (*with a firm reliance on the protection of divine Providence*), and judge of His laws (*the Supreme Judge of the world*). THE DECLARATION OF INDEPENDENCE paras. 1, 32 (1776). *See also Isaiah* 33:22.

[1347] *See, e.g., Isaiah* 33:22. See generally § 3.11.4 of this book (discussing, in light of the common-law ideal, the relations among the legislative, judicial, and executive branches of government in England as compared with government in United States).

[1348] Anglo-American common law government is particular on this point, seeking to avoid even two of the three offices of government lodged in the same person or combination of persons, exerting a single will. English common law, on the other hand, is less-particular, making the majority party leader of the national legislature's lower house (Parliament) executive in fact (Prime Minister); making the executive in law a part of the national legislature; and making the national legislature's upper house (House of Lords) to serve as a court of final appeal. Scripture is tolerant of compounding two of the offices of government in one mortal, but never three. For example, when Samuel anointed Saul as king (executive office), Samuel also commissioned Saul as prophet (an office akin to legislator), the prophet Samuel prophesying that Saul shall prophesy. *See* 1 *Samuel* 10:6. Saul thus held two of the three offices of government. God was intolerant, however, of Saul's attempt to also exercise the office of priest (an office akin to judge).

Thirteenth, of the three branches of government, both traditions honor the judicial office as the weakest in force, but the foremost in dignity and the center of human government.[1349] While the power of the sword[1350] has authority in the executive office alone, Scripture lends enhanced dignity to those holding power to judge human expressions of the law and the facts of a case, calling them—with a lower case "g"—*gods*.[1351] By long-standing convention, the common-law tradition

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Arguably, Saul's violation of God's separation of the offices of government administration by attempting to exercise all three is the reason God took from Saul his kingship (authority). *See* 1 *Samuel* 15:26. Against God's explicit orders, but in obedience to what Saul perceived will please the people—or at least the most vocal faction of them—Saul sought to conduct the office of priest by offering sacrifices. Against Saul, Samuel then delivered God's standard: "Hearkening [שמע (*shama*): listening and obeying] is a greater good [טוב: *tov*] than is sacrifice." 1 *Samuel* 15:22. Cf. 2 *Chronicles* 26:1–23, for violation of this principle.

American office holders must take care never to usurp power by exercising all three offices of the three branches of government. Every state and federal office holder's oath is to the Constitution, which demands separation of the three powers of government. *See* U.S. CONST. art. VI, cl. 3. See also generally § 4.3.1 of this book (exploring the biblical understanding of oaths). In accord with Scripture, the Constitution expresses the common law's bar against compounding these three offices of government under the power of any single unchecked will, whether of a single person or of a group. God's Word acknowledges the common-law tradition's tripartite, separate government powers. *See, e.g., Isaiah* 33:22.

[1349] The United States Supreme Court has called the judicial branch the *apolitical* or nonpolitical branch of government because it is less responsive to the shifting passions of political winds. A nonpolitical judiciary is an ideal to pursue more than a reality always realized, but we must persist in demanding the courts' independence from the other two branches of government. Liberty requires jurors and judges that are independent from prosecutors and jurors that are independent from prosecutors and judges.

[1350] The *power of the sword*, found in *Romans* 13:4, is an ancient metaphor used to signify political government's criminal jurisdiction: "the delegation to act" concerning criminal defendants and criminal matters.

[1351] *See Exodus* 22:28, "You shall not speak lightly concerning the magistrates of your people." The Hebrew term translated *magistrates* here is אלהים (*'elohim*). An oft occurring term, *'elohim* appears in Scripture 2555 times. In 2310 of these instances, it refers to God, stressing His role as Creator. In the remaining 245 usages, it refers to persons directly created by the true God (Hebrew בני־אלהים: sons of God); including the first man Adam, holy angels, fallen angels (demons), and the commonwealth of Israel's magistrates by God's immediate commission to render His—not their—judgment on His behalf.

The phrase "sons of God" does not include those who are God's indirect creation, such as Adam's wife Eve or any of Adam's and Eve's offspring (bodily descendants) because though these are direct procreations from Adam, they are indirect creations of God. The thread of consistency passing through all usages of the phrase "sons of God" is this: it refers to the Creator Himself or the creatures of His direct—as distinguished from His indirect—creation. In this sense, Scripture uses "sons of God" to describe those persons He has directly commissioned as judges. *See also John* 10:34, *John* 11:49–53. God has commissioned and used magistrates (and prophets) of questionable virtue. *See Acts* 5:34; 1 *Kings* 13:18–25.

The magistrate's office is, therefore, ministerial: neither his authority nor his judgment is his, but rather, he must derive it from God. Though not called *gods*, Scripture teaches that any authority (true right) a Roman magistrate held was derived only from God, the

remains consonant with this scriptural principle, addressing its judges with "Your Honor," and insisting that all present, including judges, stand upon their feet, unless the Jury sits.[1352] Further, the symbolic expression *Your Honor*—recognizing that the court bears direct responsibility to God, the law's source[1353]—is foreign to the civil-law tradition. Because the civilian culture, by subjecting its judges to the legislators, withholds from its tribunals the power of interpretation and real discretion, it accords little dignity to its judges. At bottom, because civil-law judges are dependent upon the state, they are never independent from the state.

The traditional dignity afforded to the common-law courts as articulators of eternal law has arisen out of respect for the eternal law's majesty and authority, as distinguished from the intimidation and danger of the temporal state's power of the sword and of the purse:

> The Executive [the President] not only dispenses the honors, but holds the sword of the community. The Legislature [Congress] not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary [the courts], on the other contrary, has no influence over either the sword or the purse; no direction of the strength or of the wealth of society; and can take no active resolution whatsoever. It may truly be said to have neither force nor will, but only judgment, and must ultimately depend upon the aid of the Executive arm even for the efficacy of its judgments . . . It can never attack with success either of the other two.[1354]

Fourteenth, both traditions demand that a judge (whether empanelled as juror or seated on the bench) be of independent mind and

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fountain of all authority. For example, Jesus, while under inquisition, responded to the Roman magistrate Pilate: "Thus far You have held [imperfect verb: *ειξες*] no authority [*εξουσιαν: eksee-ousian*] against me, *not even any* [i.e., "not a scintilla," emphatic negative *ουδεμιαν: oudemian*], except it had been granted to you from above." *John* 19:11.

[1352] In the writer's experience, most American judges follow this convention, remaining on their legs until the Jury is seated. A few judges, however, demand that the Jury stand until the judge sits.

[1353] In common-law courts, upon the entry and the exit of the Jury or the judge, those in the courtroom *rise to their hind legs* (as is said in the English courts). Moreover, the Jury enters after the judge and exits before the judge. The Jury, therefore, in symbolic recognition of its authority and power, rises to no one. In one federal court, however, the writer knows of a judge that only enters the courtroom after the Jury and demands that the Jury remain standing until he sits.

[1354] *See* THE FEDERALIST No. 78 (A. Hamilton).

judgment, free and responsible to discern the truth and to make decisions according to the law. Moreover, the judge must be free of meddling, intimidation, or threat of either, whether direct or indirect, from any other person or agency, whether in or out of government.

Fifteenth, both Scripture and the common law demand fair trials. Fairness includes impartial jurors and judges, the presumption of innocence until proven guilty, the right to due process of law, the right of the accused to confront witnesses against him, and that every material fact be established by never less than two, but never more than three, witnesses.[1355]

Sixteenth, both traditions observe *stare decisis*, looking to previous judicial decisions for analogies to serve as precedents to guide the courts. In the Scriptures, statutes[1356] are fixed and permanent standards of conduct prescribed by good authority and put to writing. Judgments include interpretations and application of statutes and leading principles that serve as precedents. Scripture directs God's people to follow the *judgments*;[1357] Moses admonished the Hebrews to follow case precedent.[1358] Thus, the common-law courts find previous cases with facts akin to the case before the court and follow the common-principle threading through those findings.

Seventeenth, both traditions demand that the executive officer of government take office at the invitation of a body of elders or electors and serve at their consent under the guidance of God.[1359] This tradition of limited kingship and government, is consonant with Scripture:

[1355] *See Deuteronomy* 19:15–19.

[1356] Hebrew: חק (*khoq*). In the Old Testament, the term *khoq* is fundamentally imperial. Derived from חקה (*khaqa*), meaning to carve or proscribe boundaries in stone, permanency is the thread running through the term's uses; its dogmatic character is apparent in all its usages: *Khoq* signifies legislative decrees from the imperial state and other imperial gods, or the God. The Septuagint translates *khaqa* with Greek terms carrying imperial tones: commandment, order, injunction, regulation, and requirement.

The phrase חקה עלם (*khaqa 'olam*) stresses the permanent character of *khaqa*, denoting an eternal or perpetual statute. The term *perpetual*, the common translation for '*olam*, falls short, however, because it refers only to the future. *Eternal* is better because '*olam* denotes "as far as one can conceive into the past and into the future," i.e., that which has always been true and will always remain true. When using *khaqa* in a negative sense—*e.g.*, as a pagan rite—it is most often translated "custom."

[1357] *See, e.g., Deuteronomy* 4:1: "And now, Israel, hearken [שמע (*shema*): listen and obey] unto the statutes [חק: *khoq*] and unto the *judgments* which I am teaching you to *do* [obey] . . . ." The statutes are God's unchanging standards of principle; the judgments are man's findings of the principle's application in particular instances.

[1358] *See* SAMUEL J. SCHULTZ, DEUTERONOMY 30 (1971).

[1359] *See, e.g., Deuteronomy* 17:16, 1 *Chronicles* 11:3.

> The earthly ruler as king in Israel was required to be subject—as an individual as well as king—to God and the law. Judicial supremacy, ultimately, was vested in God. The law under the guardianship of the priests at the central sanctuary was so vital to the king in Israel that he was instructed to make a written copy for himself. By his observance of this law, he would learn to fear and revere God in his own life.[1360]

Eighteenth, both traditions disperse authority (the authorization of power) in this present world.[1361] Scripture requires the Church to maintain a dispersion of authority and power among local assemblies and among elders within each of these assemblies.[1362] Government thus avoids abuse of power that follows concentration of power. In addition, common law insists upon separation of the powers of government and even of individuals in government, each office holder or member of each branch exercising independent judgment in direct responsibility to God.

[1360] SAMUEL J. SCHULTZ, DEUTERONOMY 62 (1971).

[1361] See generally app. 31 of this book (comparing this present *day of man* to *the DAY of the LORD*, and how these relate to inquisitorial civil law).

[1362] *See*, *e.g.*, JOHN WINEBRENNER, BRIEF SCRIPTURAL VIEW OF THE CHURCH OF GOD (1885) (supporting from Scripture the presbyterian form of church government: by elders and an eldership). *See also Westminster Confession of Faith*, ch. 31. Winebrenner was the third son of a Maryland farmer. In the providence of God, three elements alloyed in John Winebrenner: his father's and mother's Reformed faith, his mother's Presbyterianism, and his personal experience of the new birth and forgiveness of sins. At home, his mother taught him the Scriptures.

In 1820, Winebrenner accepted the call of the Harrisburg, Pennsylvania Reformed Church. Reformed Church leaders, however, criticized Winebrenner, not for his doctrines, but for his tolerance of emotive behavior during prayer meetings. Influential churchman filed a complaint petition with the Synod, summoning Winebrenner to appear and answer. Before appearing, he filed his written response to each count. Count III of the Petition alleged: "[D]uring all prayer-meetings he encourages groaning, thereby disturbing others who might, if the groaning were omitted, receive some benefit. [He] [a]llows during prayer certain persons to respond "Amen! Amen!" thereby drawing the attention of the gazing crowd which usually collects on the outside." Winebrenner's response stated that he never encouraged groaning, but when a sinner groaned for redemption, he was glad to hear it. The Synod appointed a seven-member committee to look into the matter. Meeting on 2 October 1822 and detecting no heresy, the committee advised reconciliation by forgiving and forgetting.

Reconciliation between pastor and vestry, however, failed. Upon meeting with Winebrenner, the vestry laid down its ultimatum and added that it will pay his salary only on certain conditions: he must preach only in the Church where he is pastor, exclude un-ordained preachers from the pulpit, limit the number of prayer meetings per week to one (Winebrenner customarily held three or four a week), and adjourn prayer meetings before nine o'clock at night. Winebrenner balked. "I will not consent to these arrangements," said Winebrenner; "for I am a free man, preach a free gospel, and I will go where the Lord calls me to go."

In a word, each branch is free to support the other two where it agrees, but just as free, and responsible, to resist the other two where, in good faith, it disagrees.

Thus, both traditions deny total jurisdiction to any government power. Both Scripture and the common law insist upon distribution of power by resting government responsibilities and powers on the local governments of the individual, family, county, town, village, and association or farming, mining, and water district.[1363] By contrast, concentration of state power by close gathering of population is the tendency of Babylonian culture and civil law, all aimed at the state's ease of administration, control, and domination.

Nineteenth, both teach that the forms and processes of law and government and the substance of the law are of equal dignity and worth. This is the great and overarching common-law principle *due process of law*, earlier called in England "the supreme law of the land."[1364] It is never enough that the courts and government intend the right result; they must proceed according to the proper manner and method.[1365] An improper means used to achieve a lawful goal is as lawless as a proper means used to achieve a lawless goal. According to Scripture and the common law, right procedure gives the best opportunity for good results.

Twentieth, both Scripture and the common law recognize that as long as the individual is free to arm and train himself in the use of weapons, his bearing of arms for defense of his home, family, neighbors, and country remains an insurmountable safeguard against tyranny.[1366] "Do not," said Nehemiah, "be afraid of them. Remember the LORD, who is great and fearsome, and fight for your brothers, your sons and your daughters, your wives and your homes."[1367] According to Scripture, each

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[1363] *See Exodus* 24:1, *Deuteronomy* 1:13–17, *Acts* 17:26.

[1364] *See* Murry's Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272, 276 (1856) (Curtis, J.): "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Carta." The phrase *due process* was also a fourteenth-century English phrase denoting the procedural demands recognized by men through their natural—as distinguished from their spiritual—discernment, i.e., the law of nature or natural law. See generally § 5.1.2 of this book (discussing the law of nature as understood from *Romans* 2:14–15). See also generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1365] See generally app. 3 of this book (discussing משפט: *mishphat*, the Hebrew term denoting the proper dealings among, and processes of, the three branches of government respecting law's form and substance).

[1366] *See Numbers* 1:2–3, *Judges* 3:2, *Exodus* 22:2, *Deuteronomy* 20:1–4.

[1367] *Nehemiah* 4:14.

local militia unit chooses its officers.[1368] Further, all understood that each man provided his own arms and armor; attempts to curtail this right were unlawful.[1369] Likewise, the individual right to bear arms is a part of the common-law tradition as expressed by the Statute of Winchester,[1370] the Second Amendment to the United States Constitution,[1371] and many state constitutions.[1372]

Twenty-first, both the Christian Scriptures and the common-law tradition are steadfast that the minority bears a peculiar and special responsibility. Consequently, the law obliges a country to respect and protect the minority in its oral proclamation, and written publication, of truth. Because oral and written dissemination of ideas depends on freedom of conscience, religion, speech, and the press, respect of these is indispensable to liberty. Where government chills the free and forthright exercise of these rights or where the courts fail to protect their frank expression, the minority can never fully do its duty, depriving the country of the immeasurable benefits to the individual for discernment and to the many for creativity.

To signify this minority, Scripture often uses the term *remnant*.[1373] According to Scripture, despite an overwhelming majority's indulgence in the immediate pleasure of false speech and evil deeds,[1374] God always

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[1368] *See Deuteronomy* 20:9, where the Moses uses the Hebrew verb פקד (*pacodth*) in the phrase "*they shall make* officers" to embrace the mustering of candidates followed by inspecting, charging, and appointing an officer from those candidates. This power of appointment inherent in *pacodth* includes the power of disappointment (removal from office) and punishment.

[1369] *See Judges* 5:8, 1 *Samuel* 13:19–22.

[1370] Passed in the thirteenth year of Edward I. (1285), the Statute of Winchester attacked public disorder by ratifying the old Anglo-Saxon laws requiring every able-bodied man to provide himself with arms and armor to aid in keeping the peace. In 1827, the Statute of 7 & 8 Geo. IV., c. 27 repealed the Statute of Winchester, replacing it with Criminal Statues and government enforcement.

[1371] See generally § 3.10.5 of this book (discussing the meaning of the Second Amendment phrase *shall not be infringed* and the Amendment's goal: real homeland security).

[1372] *See generally* LES ADAMS, THE SECOND AMENDMENT PRIMER: A CITIZEN'S GUIDEBOOK TO THE HISTORY, SOURCES, AND AUTHORITIES FOR THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO KEEP AND BEAR ARMS (1996) (providing much authority in support of the personal common-law right to keep and bear arms). See also generally § 3.10.5 of this book (discussing the common-law right to arms being the Second Amendment).

[1373] Hebrew: שאר (*shaar*). *See, e.g., Ezekiel* 5:10, 6:8.

[1374] *See, e.g.*, 1 *Kings* 19:18. Before our Constitution's expression of the common law's fundamental right of free speech and the right to remain silent, the common law had developed ideals and doctrines that protected the minority's right to freely speak or not to speak at all. The right to speak was claimed and developed the in order to protect the preaching of the gospel; those accused of preaching the gospel then claimed and developed

reserves a remnant unto Himself, and entrusts it with the oral proclamation, and written publication, of truth.

Twenty-second, history demonstrates that both traditions seek first to persuade betterment in individual lives, and in law and government, by presentation of a more-excellent way, not by threat of force. Scripture and common-law teaches that government is to act because the law requires, not because the state is able to force its will.[1375] Thus, men and women are able to speak and act out of faith and hope in the benefits and protections of law, instead of out of fear of the state.[1376]

Twenty-third, both traditions, having arisen from and developed in rural farming neighborhoods, stand in firm respect of land ownership and carry a strong sense of individual rights in property.[1377] We are what we are, said Justice Jackson, because our common law developed in a rural framework. This was true in Anglo-Saxon England as well as in America. Because the individual's property is a *bundle* of rights and because these rights are the individual's property, countries holding a biblical sense of private property will also carry a strong common-law sense of individual rights.

Legal standards arising from rural life adapt well to the needs of urban life, restraining the bureaucratic harshness one's liberty of life and property. Men forfeit freedom, however, where they allow legal notions that have developed according to the expediency and administrative convenience of metropolitan life to be foisted upon rural life. The

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its close companion, the right to remain silent—or, put in the reverse, the freedom to not speak—in an effort to protect their lives and the lives of others. This latter right, now known to Americans as the Fifth Amendment right to remain silent, waxed strong out of the suffering of many, including Protestant members of the English Bar loyal to shielding those who were teaching the Word of God in disobedience to the canon law of Rome (Rome's will). *See* LEVY, *supra* note 712. See generally §§ 3.7.9–3.7.10 of this book (providing two examples of colorful personalities whose struggles established fuller realization of the common-law right to remain silent: common lawyer Nicholas Fuller and Freeborn John Lilburne). Freedom of political speech was again bottled up in Parliament during the Commonwealth of 1649–1660 and until after the time of the American War of Independence. At first, the newly independent United States also confined freedom of political speech to their legislative assemblies.

[1375] Scripture teaches that mercy shall establish the king's throne (one aspect of mercy is knowing when to forbear from acting, even where law allows). *See Proverbs* 20:28, 16:5.

[1376] Terror of judgment restrains evil acts, but is not the best motivation to right behavior. Right behavior is borne out of confidence in the law's protection and its ability to deliver justice. One's lack of confidence in the courts to deliver the law's protection of the one engaged in right behavior discourages good works of faith. For this reason, our Supreme Court has always held that any perception of bias and injustice in our courts carries an irrebuttable presumption of bias and injustice that the trial court must deal with quickly and decisively because it violates fundamental due process.

[1377] *See Exodus* 20:15–17, *Deuteronomy* 19:14.

common law's origins among farmers and keepers of livestock have given it a firm view of the dignity property ownership and resolve in its protection. The Scriptures also provide strong support for property rights, recognizing property rights to be self-evident by declaring stealing unbefitting of the Christian.[1378] As does the common law, Scripture further establishes property rights by case precedent.[1379]

Twenty-fourth, both Scripture and the common law distinguish between the Church and a country's government, so that the Church—the government's and the country's voice of conscience—will stay independent and unhampered in its proclamation of God's Word and its members of independent conscience as they take part in government. On the other hand, if both Church and government become as one monolithic solidarity or *state*, Church leaders will become fawning civil servants, rendering Church members null.

Experience shows that where the Church depends for support upon the state, it will seek to please the state by speaking and acting in support of state power. Thus, God's spokesman becomes the direct tool of the political will and the Church becomes its indirect pawns. In short and at the least, the Church's—and indeed any other's—dependence on the state chills free speech and curtails obedience to truth.

Likewise, both God's Word and the common-law tradition distinguish between the Church and the government, but never separate the Church's influence from government by chilling or silencing the speech of the Church, or by barring Church members from participation in government. In the common-law tradition of Magna Carta, the First Amendment intends, foremost, to bar government control of the Church,[1380] leaving it free to influence the behavior and decisions of those

[1378] *See Exodus* 20:15. The phase, "You shall not steal," is as strong as any statement on record recognizing property rights.

[1379] Both Scripture and the common law limit government takings of private property without just compensation. The Constitution's "Takings Clause also sets forth this limitation." U.S. CONST. amend. V. *See*, *e.g.*, 2 *Kings* 21:1–19 (showing by example that those wielding government's power and prestige are not to take private property without just compensation). See also generally *Matthew* 20:1–15, for an example of the protection of a right as property: the right to act (jurisdiction) in concerning a certain matter.

[1380] The framers of the Constitution meant all of its provisions to limit government. Thus, the First Amendment is meant to bar government, not the Church: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Constitution forbids Congress from favoring any part of the Church over any other part or hindering any part. For government to violate either clause (*establishment* or *prohibition*) is to also violate the other. For example, government refusal to recognize tax exemptions to those parts of the Church that refuse government registration, while allowing tax exemption to those parts of the Church that seek government registration is to violate both clauses of the First Amendment: to favor any sect

administering government. In law and in fact, the purpose of the First Amendment is to protect and encourage the Church's duty to influence the country's government.

To distinguish, therefore, between Church and government need never bar a relationship (create separation) between the two on equal footing, any more than distinguishing a husband from his wife demands their separation. On the contrary, man and woman each has an intimate role woven into the life the other. Husband and wife are separate and distinguishable persons with differing roles and positions, charged with the responsibility of independent judgment; the two remaining, nevertheless, one inseparable unity of mutual responsibility. Likewise, freedom requires that the Church and the country's government, although distinguished in role, also faction in mutual responsibility.[1381]

Government without its conscience informed with Scripture will degenerate into the *state*: as cold, hard, and void of grace and compassion as were the iron legions of imperial Rome and the SS troops of Nazi Germany. One's conscience is profitable only if right knowledge has informed it, motivating one to right deed and word. If wrong knowledge has informed one's conscience, it will motivate to wrong deeds and words. Therefore the Church—God's people as government's voice of conscience—must inform themselves aright: i.e., understand the Scriptures and first principles, liberties, rights, and duties of our common law and government.[1382] Both Scripture and the common-law tradition keep a distinction between the Church and the government, according to their ordained roles, not a separation of the Church *from* the government. To fulfill their missions, each needs the other. [1383]

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is to create for that sect an advantage; to hinder any sect is to help other sects. The First Amendment forbids both.

[1381] To distinguish between the Church and the government is to encourage the frank proclamation of Church's voice of conscience and to insure the Church's influence in a country's government. Distinguishing between the Church and government never bars the Christian from government office any more than distinguishing between one's body and the breath that quickens it is to exclude the breath from the body. Just as exclusion of the breath of life from the body spells death to the body; so also, exclusion of influence of God's Word from a country's government spells death to that government.

[1382] *See* B.B. WARFIELD, THE WESTMINSTER ASSEMBLY AND ITS WORK (1931) (recounting an example of men, having informed their consciences with Scripture having, drafted the *Westminster Confession* as advice at the request of their country's government).

[1383] The responsibility of the prophets in their dealings with the Hebrew kings provided a check on the power of the kings' administrations. See, *e.g.*, 2 *Samuel* 12:1–15, for the famous parable of Nathan the prophet spoken in admonition toward King David and followed by Nathan's stabbing words: "You [are] *the man* [הָאִישׁ, *ha'ish*: meaning *notorious*, i.e., the man of unfavorable note in Nathan's parable]."

Twenty-fifth, both Scripture and the common law teach the non-negotiability of jurisdiction, i.e., separate *spheres of authority*.[1384] Jurisdiction is authority to act within the fixed bounds of a territory, over a certain matter, concerning a particular person or group of persons, or any combination of these. God defined to the prophets and apostles their particular spheres of authority; so also, He bestows authority to each person. Scripture, for example, charges parents with a certain exclusive authority and acknowledges that God has granted criminal jurisdiction to

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The liberty of the Church is to proclaim God's Word in frankness, is foremost among all other liberties. For this reason, Magna Carta opens and closes with declarations of the Church's independence: as though the independence of the Church is the encompassing principle of the common-law tradition. This also is why the First Amendment to the Constitution couples freedom of speech and of the press with the free exercise of religion. The Founders drafted the First Amendment in the context of Protestant culture, which demands liberal oral declaration and written propagation of the Bible. Indeed, freedom of religion is a nullity without unfettered freedom to proclaim and propagate God's Word. Freedom of the Christian Church from government control insures release of truth in deed and word. The independence of the Church in proclamation of truth is even more indispensable than the independence of the courts.

The policy behind freedom of religion under the Constitution is also the policy of Magna Carta: that the Church remain independent of state meddling and, therefore, free to speak and act in truth. Freedom of speech is the ancient and fundamental right protected by freedom of religion. Steven Langton's very drafting of Magna Carta was the assertion of the Church's freedom from the will of Rome then exercised through the power of the English Crown. Thus in drafting Magna Carta, Steven Langton certified the Church's freedom to proclaim truth respecting his country's government. Moreover, Langton wrote from independent mind and judgment without regard to personal danger of Rome's wrath. The fruits of Langton's divinely motivated and audacious activities have increased exponentially over the centuries. His noble intrepidity was the fruit of a scripturally informed conscience from which emerged truth's uninhibited voice in Magna Carta, still encourages proper and good government, resulting in increased justice.

[1384] The phrase *spheres of authority* expresses Dutchman Abraham Kuyper's ideal. Theologian, journalist, and political leader, Kuyper was man of unflagging energy. For 50 years, Kuyper edited *De Standaard*, a journal of political and cultural commentary; founded the Free University in Amsterdam (the term *free* denoting freedom from state control); organized the Anti-Revolutionary Party, a Christian political party; served in the Dutch Parliament; and served as Dutch prime minister from 1901 to 1905. In 1907, at the invitation of Congress, Kuyper addressed the United States Congress.

Somewhat as John Wyclif had held, Abraham Kuyper taught that each aspect of human activity—*e.g.*, church, government, education, business, and law—is independent of the others, confined to its own jurisdiction of endeavor, with each participant directly accountable to God. Kuyper flung this ideal in the teeth of civil-law statism and materialistic Darwinism, calling such jurisdictional independence *sphere-sovereignty*. Kuyper also held that the state be limited to its predetermined sphere of jurisdiction and accountable to God. He believed, further, that the state's function is best confined to that of an umpire or referee (as is the ideal common-law judge), deciding disputes between any of the several spheres of authority, but not meddling in their internal affairs. Kuyper's doctrine of sphere sovereignty precluded any single sphere—including the Christian Church—from presuming to speak for the whole or the other spheres of authority. *See* Oliver Woods, *Abraham Kuyper: God's Renaissance Man* (visited 10 May 2006) <www.natreformassn.org>.

the government of a country: the authority to act in enforcement of the law and in reckoning against the one having done a crime.[1385]

Likewise with Scripture, the common-law holds jurisdictional boundaries in high regard. Thus, our federal courts are courts of limited jurisdiction; our state courts are largely courts of unlimited jurisdiction; the two jurisdictions are to stay distinct and unconfused.[1386] In the common-law tradition, litigants cannot waive a court's lack of jurisdiction over the matter put before the court. Jurisdiction or authority is always the right threshold question to any activity of courts and government, "By what authority does government act?"[1387] The Constitution's basic purpose is to limit government. The common-law tradition maintains that God's unlimited jurisdiction from heaven limits earthly government's jurisdiction to act.

Twenty-sixth, both traditions demand that all government activity be done in the open and broad light of day. Neither the common law nor Scripture allows secret ceremonies, secret tribunals, or secret government activities. Likewise, the common law demands public government proceedings and trials, thereby laying them bare for independent scrutiny.

Twenty-seventh, both traditions refuse to entrust law and government to the single will of either any man or any group of men. The availability of government power will tempt a person to believe that he, or another he admires, is trustworthy to not abuse that power. The testimony of history and God's Word is incontrovertible: him to whom such power has come will use it to demand the affections of others and will seek to enslave others, in the deception that he, being a mere mortal, can be *as* God: the fountain of authority and the Supreme Arbiter of right and wrong.

Twenty-eighth, Scripture teaches that the Church is the fruit of Scripture; the Scripture, therefore, is not the product of the Church. Likewise, the common-law tradition holds government to be the fruit of true law and not the law a product of the government or state.

[1385] *See Romans* 13:1–7. See generally app. 18 of this book (discussing Tyndale's phrase *the powers that be* of *Romans* 13:1).

[1386] This allocation of jurisdiction between state and federal courts is the constitutional doctrine called *federalism*. Right understanding of this diffusion of authority between the several states and the United States federal government is an indispensable component in guarding American of common-law freedoms.

[1387] *Quo Warranto*—an interrogative: "by what authority?"—is an ancient common-law writ demanding that government prove, to the court's satisfaction, its authority for a particular government office held or franchise entered.

Twenty-ninth, both Scripture and the common-law tradition require that men respect the majesty of law over any apparent majesty of men.

To sum up, because accord between the common-law tradition and the Scripture is in their foundations, the forms and processes resting on their foundations are also in accord.

Chapter Five

Common Law & Civil Law Contrasted

§ 5.1 *Rival Worldviews: Common Law –vs– Civil Law*
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§ 5.1
Rival Worldviews:
Common Law –*vs*– Civil Law

Common law . . .
a phrase with so many shades of meanings, and probably best defined with reference to the various things to which it is opposed.[1388]

TWO basic traditions of law and government emerge from the history of mankind, have governed the globe, and still stand distinct: common law and civil law.[1389] By the vast number of nations under its control, the civil-law tradition predominates;[1390] though the common-law

[1388] 6 ENCYCLOPAEDIA BRITANNICA 777 (Cambridge Univ. Press 1910) 11th ed. Because the common-law tradition stresses process, its definition is in its doing; because the civil-law stresses academic theory, its definition is in the command of the state or *imperium*. Thus, recognizing that no written definition of the common law is complete, the following can provide a beginning of understanding upon which to build.

The common law comprises foremost court findings that fashion rules of action in support of principles recognizing, affirming, and enforcing usages and customs, limiting government and protecting the life, liberty, property, and relationships between a man and his God, and with others. In a common-law country, the courts are the foremost articulators of the law's application: the Jury controls application of the standard and is particular and fitting. In contrast, the civil law is foremost the single will of a ruler or a combination of ruling men, fashioned into legislation commanding conformity. In a civil-law nation, the Code of the scholar-legislator is the law. Thus, the legislator controls; his command is indiscriminate.

In common-law countries, legislators, as the courts, can affirm usages and customs; in civil-law nations, judges must affirm the legislator's will. Thus, common law stems from usages and customs, with the Jury and judge confirming those usages and customs; civil law is the will of the ruler with the judge enforcing that will.

[1389] Although writers have used other labels, *common law*, *English common law*, *civil law*, and *Roman civil law* are all widely accepted; therefore, the writer uses these names. From Fortescue in the fifteenth century, to Blackstone in the eighteenth century, and on to recent times, writers have used the phrase "civil law" to signify the Roman law. *See* FORTESCUE, *supra* note 59, at 62–63. Fortescue, writing in Latin and drawing distinctions between Roman law and the laws of England, used *civiles leges* (civil law) to denote Roman law. *See id*. ch. XXVI, 59–62.

[1390] "It is hardly going to far to say," writes Lord MacMillian, "that the average practitioner of the English common law knows nothing whatsoever of that other great

countries are few in the world, the weight of their benefit to themselves and others makes them preeminent. The two are not merely traditions of law, but are each an all-embracing conception of law and government that presupposes and rests upon a foundation distinct from the other and demanding contrary religious[1391] loyalties rivaling for the heart and mind of the individual.

God has embedded in each individual the capability to recognize the ideals of the common law. Recorded history traces our modern practice of the common-law ideals back to the Anglo-Saxons' local tribal custom of law and government or Volkriht. Though both the common law and the civil law are used in the Western world, a close look shows that these two traditions arise from rival sources and rest upon separate and distinct foundations of principles. Common law rests upon scriptural ideals of freedom; civil law rests upon Babylonian imperial religious precepts.[1392]

Common-law government sets on a foundation of individual freedom of conscience to chose one's relationships and associate, and to use one's property for the glory of the Creator; civil law is founded on a government of men stressing the unchallengeable will of the state and affording state exploitation of one's property. The common-law tradition

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system of law, which in its several codes, dominates the greater part of our modern world." HUGH PATTISON MACMILLIAN, TWO WAYS OF THINKING (1934), *quoted in* F.C. Auld, *The Common Lawyer and the Civil Law*, vol. 2, No. 1 U. Toronto L.J. 119–22 (1937). Since McMillian wrote these words, the civil-law tradition has spread further, seeped deeper, and waxed stronger.

[1391] See generally §§ 2.1, 2.6, 4.1.4.1–4.1.4.4 of this book (discussing the development of the civil-law concept of the legislator as lawgiver). Law demands an ultimate intelligent source: a lawgiver. Law is the lawgiver's determinations of right and wrong; to be the ultimate determiner of right from wrong for others is the prerogative of godhood. Moreover, one's entrusting in faith to obedience to such a lawgiver is religion. Thus, the tempter offered godhood to Eve, "You shall be as God, discerning [ידע (*yada*): knowledge gained from abstract reasoning independent from one's relationship with one's Creator] what is good and what is evil [רע (*ra*): literally, that which breaks good apart]." *Genesis* 3:5.

In 2 *Samuel* 19:35, Barzallai uses *yada* to signify the *ability* to discern between good and evil; such ability is the Creator's natural provision placed in every person. One's ability of discernment, however, does not always include the discipline required to put into steady practice obedience to the conclusions that one's discernment demands. See generally § 5.1.2 of this book (providing a biblical meaning, exposition, and discussion of *natural law* as the universal capability to discern good from evil). In the Garden of Eden, Adam had two choices: life and death. Dependence upon standards from the mind of God gives life; dependence upon standards from the mind of man independent from God's principles of law brings death.

[1392] *See* 2 POLLOCK & MAITLAND, *supra* note 82, at 561. The civil law is a product of the East, not the West. It first appeared as an ascertainable tradition of law and government in the East on the Plain of Shinar at Babylon and has now permeated the entire East and the entire West.

seeks the specific application of law's general principles according to the relationship of the parties before the court; civil law seeks to apply the will of the state to the individual, regardless of the relationship of the parties before the court.

Civil law traces its fundamentals to Babylon, the city founded with the intention of drawing men together into one place to enable the false security of total religious, political, and economic control. The Babylonian settlers planned their city to draw to the city, keep, control, and multiply urban populations centers. By contrast, the common-law tradition developed in a land-based farming tradition. Being land-based, the common-law necessarily developed a different and stronger view of individual contract and property rights than has the civil-law tradition, which grew out of the expedience urban society demands. Systems of law and government fashioned to meet bureaucratic expediency demanded by urban populations stress the duties of one's mandatory relationship to the state or city-state, erode the individual's freedoms, rights in property, and public liberties.[1393] On the other hand, the benefits of common law's land-based tradition of law and government has proven applicable to not only rural but also urban groups of people, while better protecting freedoms, rights in property, and public liberties.

Some argue that common law and civil law are not the only two traditions of law and government among men, that some groups of people live without any ascertainable standards of law and government,[1394] and that other groups have struggled in vain for

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[1393] The contrary ideals between urban culture and rural life are now at the forefront of American political conflict. In the last two general presidential elections, one candidate carried about 80% of America's counties; most were rural. The other carried the remainder; most were urban. This distinction is as old as the founding of Babylon's urban law and culture.

[1394] *See generally* KARL W. LLEWELLYN AND E. ADAMSON HOEBEL, THE CHEYENNE WAY (1941). Llewellyn and Hoebel have compiled case studies drawn from elderly Cheyenne people as these recollected experiences that occurred before massive white immigration altered their customs and traditions. These case studies indicate that before the arrival of the Whites, the Cheyenne people held no ascertainable standard of law in common.

Llewellyn, along with Oliver Wendell Holmes and others, were a part of the legal realist movement, which, according to Ronald Dworkin, holds law to be mere rhetoric dressed up to pass off as law in order to promote an agenda for the exclusive profit of a certain class of people. A country without right law held in the common conscience will disintegrate of its own accord; encroaching powers from without, whether good or evil, in time, will dominate that country. *See also generally* Rudyard Kipling, "The 'Eathen," *in* GUNGA DIN AND OTHER FAVORITE POEMS 47 (Stanley Applebaum ed., 1990). In this barrack-room ballad, Kipling expresses, in his inimitable way, as though the eyes of a soldier, the foregone failure of those zealous of victory, but without individual discipline to a common standard.

centuries to discover a fixed standard of law worthy of their reliance.[1395] Nevertheless, men have long observed that all traditions of law and government, or even lack thereof, tend toward one or the other—common law or civil law—although the labels vary.[1396]

The deception that common law and civil law are compatible[1397] comes by an illusion similar to that created by vigorous stirring together of oil and water, giving the appearance that the two will blend. As long as one maintains such agitation, a false perception of blend ability persists. Once, however, the stirring stops, the oil, having lower specific gravity, rises to the surface.

Co-mingled and stirred among humanity, common law and civil law interact as do oil and water. The perpetual strife of the religious, economic, and political world keeps these two traditions in constant encroachment, agitated and mixed, blurring distinctions, and all the while giving a false perception of compatibility. The common law and civil law traditions, however, having no elemental commonness, will never blend.

Further, where the two traditions meet, they appear to merge, obscuring the common law's and civil law's separate and distinct support systems. The two traditions mingle, but only in rivalry. For example, as one looks down upon a deciduous forest from the ridge above, the branches of a hard maple and a soft maple trees, standing side-by-side in the dense woods, are undistinguishable; their mingling branches obscure their independent support systems. Yet, upon close inspection, while

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[1395] See generally app. 10 of this book (discussing Islam's attempts to justify a fixed a standard of law).

[1396] Lincoln, in observing this tendency of all governments toward one or the other traditions, common law or civil law, signified the doctrines of civil-law government with the phrases *the divine right of kings* and *governments of men.* According to B.F. McClerren, Lincoln used these phrases in this sense in his debates with Senator Steven A. Douglas. During their debate at Alton, Illinois on 15 October 1858, Lincoln identified what he considered to be the real issue between he and Judge Douglas:

> That is, the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are *the two principles that have stood face to face from the beginning of time, and will ever continue to struggle*. The one is the common right of humanity and *the other the divine right of kings*. It is the same principle in whatever shape it develops itself . . . it is the same tyrannical principle (emphasis added).

[1397] See generally app. 11 of this book (discussing *holiness* as the Christian duty of discerning God's distinctions).

standing on the forest floor between the two, two facts become clear: different trunks support these two trees and these trunks draw their life from independent root systems, which, as do the branches, also mingle and compete. The roots of the two trees mingle only because the trees compete for nutrients and sunlight. Further, though the two are alike in appearance, they differ in substance: the soft maple yields little sap and its wood is of little demand; the hard maple yields abundant sap for maple syrup and its wood is in good demand.

The common-law and civil-law traditions each stem from distinct sources, depend upon different elemental ideals, and yield contrary results; and—as do the limbs and roots of the hard and soft maples—when the two mingle, they respond as rivals.[1398]

Thus, the best way to clearly see the differences between the two is to examine the origins, sources, and purposes giving rise to each. Likewise, when two parties or nations disagree on a common standard (common-law or civil-law) by which to govern their relationship and resolve their differences, the two will remain in perpetual tension, intermittent conflict, and under threat of violence and war.[1399] This reality helps explain the history of England and the United States, our war with Japan and Germany, the disposition and outcome of the war trials that followed, and the present war on terrorism.

For example, if both America and Islamic terrorists ever agreed to submit to a common standard to govern their differences, war would be unnecessary. Islam's religious creeds and the legal standards demanded by these creeds, however, forbid their acceptance of our ideals and the

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[1398] See generally §§ 2.8–2.13 of this book (providing examples of dissemination of the civil-law tradition among nations). The feet of the image in Nebuchadnezzär's dream represent the incompatible mixing of civil law and biblical standards among humanity. See generally apps. 27, 28 of this book (discussing Nebuchadnezzär's power and the mixing of the civil-law tradition throughout humanity).

[1399] Where common-law first principles are truly practiced in any two given countries, war, as a means of resolving differences, is unnecessary because both countries are bound to a common fundamental standard whereby to resolve their differences. For example, civil-law Scotland and Quebec co-exist with common-law Canada; and civil-law Louisiana co-exists with her sister States because appeals from this civil-law country, province, and state subject them to over-arching common-law appellate jurisdictions that provide a common standard whereby to govern their relationships.

The common-law appellate courts of Britain, Canada, and the United States compromise and dominate the principles of the civil law by overlaying the civil-law statutes with binding case precedent pursuant to *stare decisis*, the polestar of the common law, conforming these otherwise civil-law jurisdictions to common-law standards of process and law. The trumping authority of common law's *stare decisis* brings two advantages: the common law's restraint to arbitrary decisions and consistency between cases of like facts and circumstances.

standards of right and wrong demanded by these ideals; thus, in the event either party injures the other, no remedy is available, save war. America's War with Imperial Japan and Nazi Germany[1400] erupted for this same reason. At bottom, civil law's veneration for imperial command is at enmity with our common law's respect for law. No mutual acceptance of a common objective standard whereby to settle differences brings men to violence and nations to fields of battle.

One does not find the controlling distinctions between the common law and civil law in the statutes of these two traditions on any given subject. Particular standards of conduct of both are often alike. One does find the controlling differences, however, in the principles at the foundation of each tradition, the purposes behind them, and in the methods demanded by each tradition, or lack thereof, in settling quarrels. The common-law tradition seeks specific guidance in the present by giving great weight to its courts' consideration of conflicts and wrongs of the past; by contrast, civil-law culture places faith in the scholar-legislator to make law for the unknown future, as he considers legislation abstracted from the facts of controversies that have arisen out of real relationships. The distinctions between common law and civil law flow from the ideals at their foundations.

[1400] These three cultures—Islam, Imperial Japan, and Nazi Germany—have arrogated characteristics of deity, including the right to demand absolute loyalty and unquestioned obedience, to three mere men: Mohammed, the emperor of Japan, and Hitler. Common-law countries have proven unwilling to excuse the atrocities resulting from such utopian fantasies, misplaced loyalty, and fawning obedience. The affirmative defense of those from the Axis powers accused of war crimes reveals the irreconcilable differences between the common-law tradition and the civil-law tradition.

According to Nuremberg prosecutor William Franklin Fratcher, those convicted at Nuremberg argued that obedience to the will of the state is a complete defense to all criminal acts: a reasonable argument, only if one recognizes the state as the highest authority in one's life. Civil law obligates the court to recognize that obedience to the orders of the state is an affirmative defense to crime because the civil-law state recognizes no authority above itself. The atrocities resulting from the false belief that obedience to the state is a safe harbor to any crime demanded war. *See generally* 13 MO. L. REV. 45 (providing W.F. Fratcher's impressions concerning the Nuremberg trials).

Nazi Germany's and Imperial Japan's unprovoked strikes against the United States reveal that both nations understood their disagreement with the United States over a common external standard whereby to govern their relationship, that their difference with the United States was irreconcilable, and that war was, therefore, unavoidable. Thus, Nazi Germany, during the night of 31 October 1941, struck preemptively in the waters west of Iceland, torpedoing and sinking United States Destroyer Reuben James; 37 days later, Imperial Japan struck preemptively, bombing the United States Pacific Fleet at Pearl Harbor Naval Base. Islamic nations' recent preemptive attacks upon the United States result from their belief that their differences with America are irreconcilable: i.e., they refuse to accept our common-law standards whereby to govern our relationship with them and we refuse to accept their standard.

§ 5.1.1
Fountain of Law:
God –*vs*– State

Who gives purity out of impurity? No one.[1401]

Three fundamental questions distinguish the common-law and civil-law traditions: *First*, who is the source from which law springs? That is, who has power to create or make law? *Second*, who interprets the law? That is, who decides which rules govern any particular legal dispute and their application? *Third*, whom does the law bind? Everyone? Including the one that governs or only the one governed? In summary, who makes law, who interprets law, and who must obey the law? All three questions are personal, concerning "who?" as distinguished from the impersonal, i.e., "what?" Any questions concerning "what?" become clearer once one answers the fundamental questions concerning "who?" Common law is foremost, at every level, a personal and, therefore, a relationship matter.

For example, if one knows that the persons articulating, interpreting, applying, and enforcing law are clothed with true authority to do so, and that these persons are also bound by this law; *then*, one is confident in determining what one's duty is in light of that authority; no cause to hesitate remains. In a word, answering the foregoing questions concerning "who?" will reveal the controlling differences between the common law and civil law.

Even before the coming of Christianity to the early Anglo-Saxon tribes, their folk law held that the dooms (judgments) were divine, eternal, and therefore, unchanging and unchangeable. Since the coming of Christianity, the common-law tradition has held that law never changes because law's source is the immutable God of creation, through his Word. By contrast, through the ages, the civil-law tradition has insisted that the mind of man is the fountain of law, by his naked (unaided) powers of reasoning. From this distinction between the two traditions, emerge conflicting results.

By tracing a nation's law to its fountain, one will discover what that nation recognizes to be sovereign.[1402] The civil-law tradition maintains

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[1401] *Job* 14:4.

[1402] Thus the saying, "Show me your lawgiver and I will show you your god." See generally app. 22 of this book (discussing the meaning of *lawgiver*).

that the sovereignty of the state is ultimate and unlimited—i.e., total.[1403] Further, the civil law personifies state sovereignty in its legislative power holder or lawgiver, from whom there is no appeal. Therefore, the single will of a certain man (dictator), or combination of men (legislature), is the state: that one from whose will, as decreed by its laws, there is no appeal to independent courts. Though civil-law countries use appellate courts in form, these exist not to vindicate personal rights, but rather, to further justify the will of the state: civil-law appellate courts are dependent upon the state.[1404] In addition, the civil law acknowledges as law only what the state has decreed and, therefore, disallows dissenting judicial voices.

On the other hand, the common-law tradition recognizes law above human legislators. The traditional common law acknowledges that the law's source is the eternal and transcendent God of nature: nature's Creator. The Declaration of Independence, our organic document of law and government, acknowledges the "Laws of Nature" and the source of those laws: Nature's God and divine Providence. This acknowledgement is not merely legal, but is also personal because it appeals to the law's intelligent source: the person of God.[1405] On the other hand, civil law's

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[1403] As used throughout this book, the term *state* signifies government that has confounded its three offices—judicial, legislative, and executive—in the will and power of a single man or body of men claiming *sovereignty*. The term *sovereign*, when used of the state, refers to the state's refusal to recognize any appeal from the unlawfulness of its laws, their application, or their enforcement. The sovereignty of governments administered by men, however, exists only in a limited sense because man's government is "bounded by the laws of God." 2 BY A SOCIETY OF GENTLEMEN IN SCOTLAND, ENCYCLOPÆDIA BRITANNICA 618 (1st ed. Edinburgh, A. Bell and MacFracware 1771).

[1404] The Constitution requires that all federal courts remain independent of the executive and legislative powers; only the Supreme Court, being as Congress and the Presidency, a creature of the Constitution, is co-equal with the other two branches of government. Thus, the United States Supreme Court is a direct creation of the Constitution, while all other federal courts are direct creations of Congress. In the common-law tradition, all of our federal courts are independent, but only the Supreme Court—because it stems directly from the same Constitution as the Presidency and Congress—is co-equal with these two branches.

Once Congress has ordained and established an inferior federal court, the Constitution grants to that court *the judicial power*, which is unlimited within its constitutionally limited jurisdiction. *See* U.S. CONST. art. III, § 1. Though the Constitution limits the subject-matter jurisdiction of the federal courts, and though Congress from time to time further limits that subject-matter jurisdiction, Congress is without constitutional authority to limit the judicial power, as understood at common law, within that subject-matter jurisdiction. The federal courts have all the judicial power of the common-law tradition, but only over those subjects set by the Constitution and Congress. Simply put, the Constitution bounds the subject-matter jurisdiction of every federal court. However, within those bounds, the Constitution warrants the judicial power in the fullest sense of the common-law tradition.

[1405] *See* THE DECLARATION OF INDEPENDENCE para. 1, 32 (U.S. 1776). To waive off the American Declaration of Independence's references to God as mere formality and, thus,

concept of state sovereignty includes the doctrine of state positivism: i.e., the state is the law's ultimate and impersonal[1406] source and the state's codes, legislative acts, executive regulations, and decrees are the state's commands. Civil law's doctrines preclude its lawyers from going behind these expressions of the state's will for greater authority.

Scripture's pronouncement that the LORD is in the Heavens and He has done whatsoever pleases Him,[1407] stands opposed to the Roman maxim of the total state, "the prince's pleasure is law":[1408] the dominant thread running through the history of the civil-law tradition. Whether embodied in one person such as a prince or dictator, in a legislative body of persons, a combination of both, or a simple majority of the people, the civil-law tradition accords absolute power to *the prince's pleasure*: a single will called the state.

The Bible calls this age of man's assertion of human dominion on earth the *day of man*, meaning this age of man's handling of government and justice.[1409] According to the civil-law tradition, the state's legislative acts are subject to no other authority—earthly or heavenly. Lawmakers

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impersonal respects paid, is not only an historical absurdity, but ignores the personal character of such formalities: men pay formal respect to those from whom they seek favor. The writer is unaware of any competent evidence demonstrating that the Declaration's formal respect paid to God is mere window dressing; if it is, it is mockery.

[1406] Using the fiction that embodies a nation in a semi-deified state, promoted as compassionate, caring, and able to protect—a savior of sorts—, despots over the centuries have attempted to soften the impersonal coldness of its civil law's materialism. As with the settlers of Babylon and all her progeny, a people's veneration of such persons fosters tyrants and gives rise to statism. The kingcraft of tyrants is the priestcraft of government:

> That the almighty hath . . . entered his protest against monarchial government is true, or the scripture is false. And a man hath good reason to believe that there is as much of kingcraft, as priestcraft . . . [f]or monarchy in every instance is the Popery of government.

THOMAS PAINE, COMMON SENSE 76 (reprint 1986) (1776).

[1407] *See, e.g., Psalm* 115:3, *Jonah* 1:14.

[1408] *Quod principi placuit habet vigorem. See also generally Ecclesiastes* 8:1–5 (acknowledging the basic civil-law principle: the prince's pleasure is law).

[1409] The present *day of man* is also the day of salvation, "[N]ow is the day of salvation." 2 *Corinthians* 6:2, *citing Isaiah* 49:8. The arrival of the Day of the LORD brings the judgment and the vengeance of the LORD. Because the day of man and the Day of the LORD appear together in Scripture, many, including John the Baptist, have concluded that the two occur concurrently. When Jesus read aloud *Isaiah* 61:2 and then pointed out the time distinction and sequence of the two—i.e., the vengeance of God against the Roman state must await the completion Jesus' ministry of suffering—, the viciousness of His own people erupted against Him. *See Luke* 4:16–30. Failure to distinguish the time difference between the salvation of God's elect and God's execution of His vengeance discourages some of God's people and angers others against God because God has yet to execute what they imagine and want: immediate vengeance against their oppressors.

focus on vindicating the monolithic state: the very definition of state legal positivism. Against total state power, tracing its recorded beginnings to Babylon's settlers, stands a tradition of individual authority, tracing its recorded beginnings to the divine bestowal upon each man of the ability to recognize those procedures and forms of law and government best calculated to secure justice. The Anglo-Saxons insisted upon dispersed authority, requiring that their kings act only upon the advice and at consent of a council of elders, functioning as discoverers, discerners, and articulators of the immutable judgments (*dooms*) of immortal deity, but never as lawmakers.

The instability stemming from the state as the ultimate source of law of many modern civil-law countries of Central and South America and continental Europe, has driven them to seek stability in constitutions to which the state's legislation must conform. By allowing changes in legislation by a simple majority vote or executive regulation, some say these constitutions have curbed the imperial legislative power and weakened state positivism. They have not.

The notion that the state is the only source of the law remains untouched by these civil-law constitutions so-called; state positivism remains axiomatic. Going further, some civil-law governments have set up a single special court to review the state's legislation for constitutionality.[1410] Such a court, however, is a creature of the legislature; thus, its judges are arms of the legislature, lacking boldness to challenge legislation for fear of losing their livelihoods. Further, by having concentrated the power of legislative review in a single court—instead of in all courts, as in a true common-law jurisdiction—, the legislature, though giving the appearance of judicial review, by the ease of controlling that one court, keeps the interpretation of their legislation in their control.[1411]

[1410] Invented by positivist Hans Kelsen, the modern European model of constitutional review operates under civil-law principles and is wholly unrelated to common-law judicial review: a procedure by which common-law courts supervise the exercise of public power. By contrast, Kelsen's modern European constitutional review consists in no more than civil-law tribunals with sole responsibility over constitutional disputes. Called Kelsenian courts, the First Austrian Republic was the first to use them. The Federal Republic of Germany, Italy, Spain, Portugal, and many countries of Central and Eastern Europe then followed. Hans Kelsen was a product of the *Akademisches Gymnasiums* of Vienna: the Jesuit's premier institution for the propagation of humanism.

[1411] All courts in the United States, state and federal, are, as a matter of law, competent to review legislation for lawfulness (constitutionality). Such widespread distribution of jurisdiction for this purpose is indispensable to freedom.

Despite appearances, the civil-law tradition remains aggressive. In modern times, some civil-law states claim to have limited their own power. Upon closer look, however, one discovers that any seeming purge of state power has been, rather, a transfer of power to other persons, or to international and supranational organizations, which follow the traditional civil-law model, not the common-law tradition. Further, members of international organizations—such as the European international human rights commission and its court of justice—empower these tribunals to set aside the national laws of its member nations and become the highest source of law and court of last resort. Civil law's inclination toward central power through international organizations aggressively threatens American common-law freedoms.

Modern state positivism continues the soul of the civil-law tradition: law is the will of the state expressed by its legislative power, whether embodied in one man, such as a prince or dictator, or a group of men, such as a legislative body, or both combined. Modern civil-law now encroaches into common-law countries by administrative law and power of bureaucracies; the legislature shirking law-making power and giving it to the executive, who then promulgates profuse administrative regulations[1412] and executive orders[1413] and forms his own administrative tribunals to set in judgment upon his own will as expressed in his regulatory legislation. In common-law countries, such handing over of legislative power to the executive is now among the greatest threats to rights of life, liberty, and property.

Law is a personal matter concerning the personal Creator; to exclude recognition of the law's Author results in an impersonal law akin to the cold, hard, iron hand of imperial Rome: undiscerning and disrespectful of the individual dignity that God demands be given to each person. A critical mass of individuals acknowledging that the God who made each person is the fountain of highest and eternal law is necessary to enjoy individual freedom. The court in constant search shall discover the applicable law governing man's expression of law, whether legislation or

[1412] Stemming from the Latin root "regal," the terms *regular* and *regulation* signify a civil-law concept: that which demands, and that which conforms to, a uniform rule. Thus, in a military context, "regulars" are those troops trained and conditioned to a strict and uniform, machine-like standard of precision. In an administrative-law context, "regulations" are commands promulgated by someone other than the true legislative power, such as the executive by means of his bureaucracies and administered in strict uniformity, regardless of relationships and circumstances.

[1413] See generally § 6.3.1 of this book (discussing the history, character, and hazard of executive orders).

court opinions. The common law's worth is its peculiar method of engaging in this pursuit; it is incumbent upon each person to pursue it as God provides light and ability.

§ 5.1.2
Natural Law:
Common Sense –*vs*– Baseless Logic

Law is the expression and the perfection of common sense.[1414]

Understood as a biblical concept, the phrase *natural law* signifies standards of conduct inherent in relationships among men and women, discoverable by reason that rests on general revelation—knowledge of God's character and law through creation—or Scripture and guided by innate moral sense. Natural law signifies the inborn capability to sense right from wrong that lies dormant until enlivened by personal threat, indignation, or moral outrage: it is one's ability to know law's standard, once one stops and reflects. "God has furnished Men," wrote John Locke, "with Faculties sufficient to direct them in the Way they should take, if they will but seriously employ them."[1415] By using his subjective nature, each man is capable of recognizing right from wrong from observing objective nature, i.e., his surroundings. Common law and government is the outworking of natural law among a people.

Though the phrase "natural law" is not taken from Scripture, it is sometimes used with reference to *Romans* 2:14–15, as though these

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[1414] Lawyer Joseph Hodges Choate. Choate is correct because according to *Romans* 2:14–15, the ability to discern right from wrong (law) is a sense common to all.

Toward the end of his patriotic life, Choate summed up his convictions:

> [T]o . . . maintain and defend those inalienable rights of life, liberty, and property upon which the safety of society depends, to succor the oppressed and to defend the innocent, to maintain constitutional rights against all violations, . . . to rescue the scapegoat and restore him to his proper place in the world—all this seemed to me to furnish a field worthy of any man's ambition.

Choate was well-known and admired for his skill at cross-examination and for his winning argument in the landmark case Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673; 39 L.Ed. 759 (1895), *reh'g granted*, 158 U.S. 601, 15 S.Ct. 912; 39 L.Ed. 1108 (1895), in which Choate won a constitutional challenge against the income tax act of 1894. "The act . . . ," Choate told the Supreme Court, "is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what should I call them—populistic [sic] as ever have been addressed to any political assembly in the world." *But see* South Carolina v. Baker, 485 U.S. 505, 108 S.Ct. 1355; 99 L. Ed. 2d 592 (1988).

[1415] Capitals in original.

verses teach that every one knows right from wrong. These verses, however, teach rather, that each person—being of Adam's race—is endowed with the natural *ability* to discover and distinguish right from wrong. Natural law is not law that every person knows, but is that law which each person is able to discover, learn, and know, through his natural potential.[1416] Thus, the common-law tradition claims for the courts the ability to find the law by considering the evidence.

Because the scholastic doctors, following Gaius and Justinian's Institutes, have cut loose the phrase *natural law* from its moorings in Scripture,[1417] it remains subject to varying definitions of preference, resulting in disagreement, general confusion, and bewilderment. For example, Brierly observes that the medieval scholastics' notion of natural law was only that law which "the best human reasoning could discover." Brierly then reproves Jeremy Bentham in absentia (Bentham had been long-since dead) for Bentham's "foolish criticism" of the medieval writers' formulation of natural law, stating that Bentham "merely showed a contempt for a great conception which Bentham had not taken the trouble to understand."[1418] Dean Pound points out that the name "natural law" is an old label that modern writers attach to their ideas because it carries into their ideas the good will of earlier usage that adheres to it. "Natural law," says Pound, "as revived today . . . would salvage the good

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[1416] By nature—i.e., in their mere natural physical state—, most every member of Adam's race engages in humanly good activity, unless their natural conscience has been permanently branded over (seared) by false doctrine. At each person's physical birth, God stamps upon his or her being the knack to discern and discover right from wrong. *See Romans* 1:26–27, 31. Nevertheless, even though God, as Creator, has *stamped* each person with these natural abilities, persistent yielding to the seduction of false doctrine burns a permanent brand over nature's stamp that destroys any understanding attained naturally by one's conscience. "In play-acting [*'υποκρισει* (*hupokrisei*): as Greek stage players, answering (*κρινομαι*) from behind (*'υπο*) a mask], speaking lies, their private conscience permanently branded [*κεκαυστηριασμενον: kekausteiriasmenon*]. *See* 1 *Timothy* 4:2. Only the spiritual birth enables overcoming of this natural weakness toward false doctrine. See generally app. 30 of this book (discussing the scholastic doctors' substitution of Greek notions for Scripture's presentation of natural law).

According to *Romans* 1:17 ff., God reveals His knowledge step by step, as the recipient in faith acknowledges each increment of fresh revelation. "For in it [the gospel] God's righteousness is revealed out of faithfulness into faith . . . ."

[1417] Gaius equates the natural law (*ius naturale* or *naturalis ratio*) with the law applicable to all people (*jus gentium*). *See* G. INST. 1.1.9, *cited in* BERGER, *supra* note 236, at 528. Moreover, Justinian then treats the Roman civil law and the law applicable to all people as synonyms, which, says Berger, is "confusing." *Id., citing* J. INST. 1.2.1. Following Gaius and Justinian, civilians and scholastics still equate the natural law with the Roman civil code, albeit contrary to *Romans* 2:14–15.

[1418] J.L. BRIERLY, THE LAW OF NATIONS 20–21 (1955), *quoted in* BLACK'S LAW DICTIONARY 1049 (7th ed. 1999).

will of an old name as an asset of the science of law."[1419] Such confusion over the meaning and significance of natural law[1420] has crept, by stealth, into our courts.

To hold that natural law is law that all know by nature is to hold the same civil-law fiction that says, "[i]t is axiomatic . . . that 'every man is presumed to know the law' and [its sequel] . . . 'ignorance of the law does not excuse' . . . ."[1421] This fiction has crept into our thinking about the natural law through the medieval scholastic doctors by way of a recent innovation: criminal codes. Nevertheless, that all are responsible to know the law does not mean that all indeed do know the law. Observing such a maxim for bureaucratic convenience, or to satisfy a lust for uniformity (one size fits all), will fail to make the statement true and bring a right outcome. The traditional common law has recognized that, in fact, not all do know the law: the common law distinguishes between one's ability to learn and respond to the law (i.e., responsibility), and an innate

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[1419] ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 29 (1938), *quoted in* BLACK'S LAW DICTIONARY 1049 (7th ed. 1999).

[1420] By slight of words and confusion of meaning, false notions of natural law have made clandestine insertion into our courts. The following phrases on the theme *natural law* will aid in research: *natural rights*, *higher law*, *law of nature*, *human rights*, *the law of reason*, *divine law*, *natural justice*, *the moral paradigm*, and *moral law*. According to the Word of God written, natural law is the *ability* the Creator has placed in all men—redeemed and unredeemed—to discover, discern, and articulate the truth of His standards. The redeemed have the further ability to accept and appropriate these truths in constant practice; the unredeemed do not. See generally § 5.1.2 of this book (discussing regenerate as well as unregenerate man's native and individual God-given ability to discern right from wrong and to apply the law aright to the behavior of others; and the unregenerate person's inability to persistently acknowledge and apply the law to himself).

[1421] Scott v. Ford, 45 Or. 531, 78 Pac. 742, 744 (1904). The civil-law fiction that every man is presumed to know the law is absurd when applied to a statutory prohibition that is, in and of its self, moral, but which legislation nonetheless prohibits; or when applied to an omission of a required act made felonious by statutory decree. Indeed, if all know the law, then it is unnecessary for prosecutors, judges, and defense counsel to research the law of the case pending before the court; but it is necessary. Further, why is it necessary that judges and lawyers fashion from their research of the law, instructions for the Jury directing jurors to hold the accused responsible for his lack of knowledge of the *law*, of which they and the jurors also were ignorant until a short time before? What reason is there, asks Spooner, in holding the accused to a higher standard of knowledge than that to which the judge, the lawyers, and the jurors are held? As a universal maxim, the notion that ignorance of the law is inexcusable is indeed absurd.

Undiscerning application of the maxim that ignorance of the law is no excuse and the subsequent presumption that all know the law, is a product of civil-law notions that have found their way into thought concerning *Romans* 2:14–15: i.e., natural law means that everyone knows right from wrong.

knowledge of the law. Unfortunately, however, courts often take for truth this fiction of convenience that all know the law.[1422]

Though the meaning of natural law has become subject to variations of individual preference, Scripture, nevertheless, provides the touchstone by which one must test one's understanding of natural law:

> For when the nations that have not a law, by nature might from time to time do[1423] the things contained in the law, these not having a law, to themselves are a law; which proves that the law's impression [is] written in their desire, their conscience testifying with their desire. Also, between one another they have thoughts of legal accusations and legal defenses.[1424]

[1422] For example, respecting criminal law, the United States Supreme Court has distinguished between mere human legislation such as the tax code, often freighted with ambiguities and speculative attempts at precision and finality; and crimes of which ignorance will never excuse. For example, genuine ignorance of the tax laws, said the Supreme Court, is a defense to their violation. *See* United States v. Cheek, 498 U.S. 192, 87 S.Ct. 22, 112 L.Ed. 2d 617 (1991). At the common law of crimes, the general rule is that ignorance of the law is not a valid defense against prosecution. This general rule, however, has fact driven exceptions.

The common law of crimes has always, from its earliest days, distinguished between "general intent" and "specific intent" crimes; with specific intent crimes, ignorance of the law is a valid defense. At common law, strict liability does not have universal application because the liberty of the individual and not the enforcement of the legislators' will is the overriding policy. The criminal statutes referred to in *Cheek* are examples of statutes requiring specific intent in order to amount to crime.

[1423] More than on any other factor, the biblical understanding of natural law turns on the mood of this verb (*ποιωσιν: poiosin*, meaning *do*). Paul casts the verbs before and after this verb in the present active indicative. Paul distinguishes, however, the verb *poiosin* from the verbs before and after it by placing *poiosin* in the present active potential subjunctive: i.e., possible activity qualified by a contingency. The unbelieving Gentile's behavior *might* be, at any future moment, in conformity with God's law. But even though this conformity *could* occur at any time, it will not consistently occur because the unbeliever's conformity with God's standards depends upon circumstances: his obedience is contingent changing fixed. Even though the unbeliever's persistent orientation is contrary to God and His standards, given certain circumstances right behavior may punctuate his life. *See Romans* 8:7. By contrast, the believer's steadfast orientation is toward God and His standards, regardless of circumstances, but he may punctuate his life with wrong behavior. Such is the teaching of Scripture and the experience of life. *See* 1 *John* 3:9, "Everyone born of [*εκ* (*ek*) used with the genitive of source: out of] God . . . cannot habitually sin [*αμαρτανειν* (*amartanein*): present indicative]." *See* H.E. DANA AND JULIUS R. MANTEY, A MANUAL GRAMMAR OF THE GREEK NEW TESTAMENT 195 (1927) (discussing John the apostle's use of the Greek present indicative, as opposed to the Greek aorist, to express persistent behavior).

[1424] *Romans* 2:14–15.

Though the foregoing translation enlarges the letter of the original, it remains within the scope of Paul's words. Paul, taking the role of prosecutor, proposes that whether or not all have heard or read, all men are capable—even able—to know what God requires of them. Why? Because God, by nature, has written the sense of right and wrong in their *hearts* (natural yearnings);[1425] it is innate.[1426] Every man, therefore, stands responsible before God to exercise his natural ability to discern right from wrong and to choose and apply what is right. Paul does not speak broadly that men know right from wrong; rather, he delimits his assertion: when men obey any particular principle of God's law, they show that they have learned right from wrong respecting that particular provision. To speak broader is mere speculation.

To say that everyone knows right from wrong because such knowledge is of the law of nature is as absurd as it is to say that all people know the laws of electricity. Note, however, that once a fellow feels the bite of an electric fence or the jolt from a frayed appliance cord he, by nature, will understand enough of the laws of electricity to avoid such pain. So also, by nature, the same fellow will take interest in the laws governing human relationships insofar as such knowledge will protect him from pain and loss or bring him gain and comfort. In proof of this proposition, Paul sets forth three plain evidences: *first*, even unregenerate men, at times, obey God's law; *second*, when men disobey God's law, their consciences sting them (guilt pangs); *third*, unregenerate men have accusatory thoughts about another's violations of God's law on the one hand, and when accused of legal violations, they conjure up defenses in self-justification on the other hand.

Not only does reason come to every one by nature, but also the ability to develop skill in using it. Only steadfast resting on truth enables right discernment through reason. Reason is only as reliable as the premise upon which it rests: the presuppositions reason accepts to be self-evident and, therefore, unnecessary to prove.

[1425] Greek *καρδια* (*cardia*) and the French cognate *coeur*, carry the idea *center* or "middle," thus the English *courage*: viz., strength at the *core* of one's being. The Old Testament Hebrew equivalent term is לב (*leb*), the "heart": *the seat of intent coupled with will and fortified with desire and conviction*. Any single term used to translate *cardia* falls short, but "desire" is as good as any because it couples intent with will.

[1426] By nature: Greek *φυσις* (*fusis*), instrumental case. This term is from an old Greek root *φυω* (*fuo*), meaning *to beget* or bring into being. Paul's point in this verse is that God endows each individual, by his physical birth, with the means to discern right from wrong. Spiritual enlightenment is not required to have and exercise this innate ability, but is necessary to rightly respond.

Reasoning is an ability one builds. Lord Coke, in his exchange with King James I.,[1427] denied the king's authority to sit in judgment in the courts for two reasons: *first*, said Coke, to do so is a violation of the common-law principle separation of powers; *second*, only those knowing the common law are fit to serve as judges; thus, Magna Carta so requires.[1428] Coke explained, saying that one obtains understanding of the common law's application over time only through *artificial reasoning*.

In labeling reason as *artificial*, Coke never intended any structure of reasoning that was less than real. Rather, he used the term as understood in his day, according to its etymology and as applied to construction of large buildings. To Coke, "artificial" denoted the building of an *artifice*: set on a true foundation, designed according to plan, and improved through experience over decades. Thus, the term "artificial," as Coke used it to describe common-law reasoning, invoked mental images of the building of a grand cathedral. In Coke's day and times prior, men built cathedrals, with premeditated design, using natural ability, with construction extending over decades.

By this analogy, Coke applied the term *artificial* to fallen human reason: one's pursuit of reason, based on good evidence, and built through long study, observation, and experience. Such an artifice is not the result of every man's undeveloped natural ability to reason, but rather, the mental construction of the diligent built up over time by steady study rumination and pondering, testing conclusions against Scripture, experience, and facts in an effort to overcome the mental flaws resulting from Adam's fall.[1429] God intends a person to first set his reason on the foundation of His Word and then to build it throughout his life.

According to Coke, though people are born with natural ability, no man is born an artist or expert.[1430] Though every person is imperfect, Coke held that, nonetheless, each person's use of his natural ability is according to his own developed experience. For example, Mark Twain had the natural ability to write, but by his own testimony, to develop that ability required long, steady, and, hard work.[1431] Likewise, common law is

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[1427] See generally § 3.8.2 of this book and accompanying notes, for a brief of the divine-right-of-kings doctrine in English history after Magna Carta.

[1428] "We will not make justices, constables, sheriffs, or bailiffs who do not know the law of the land and mean to observe it well." MAGNA CARTA ch. 45.

[1429] *See Hebrews* 5:14b.

[1430] *Nemo nascitur artifex*. The wisdom of the law is gotten only through diligent rumination. *See* BLACK'S LAW DICTIONARY 1661 (7th ed. 1999). *See also* 2 *Timothy* 2:15.

[1431] *See* WINTERS, *supra* note 39, at ch. 2, § 3.

the human refinement of divinely bestowed natural reason; got by steady, sober, and intelligent work; followed by the moral ability to accept reason's conclusions.

Some say that natural law is never innate because man has no knowledge of it at his conception in his mother's womb. This is true in that God never grants knowledge at one's conception in the womb of what is right and wrong concerning any given legal question. Nonetheless, God does grant at one's conception, the *capability* of knowing. Natural law, therefore, is not knowledge of a list of laws, but rather, it is the *potential* to develop the ability to discern right and wrong; God has embossed this potential upon every person's heart (yearning) at physical conception,[1432] and it remains ever present.

As one tests his conclusions of reason against experience, one's confidence in his conclusions grows. Humankind, moreover, in distinction from animals, enjoys the additional benefit of learning and gaining confidence from the experiences of others. The writer's father once observed that no cat will ever sit on a hot stove lid more than once. Some will say the cat's response is a conditioned reflex. Nonetheless, through the empirical mechanism called experience, the cat can know that hot stove lids are painful to sit upon and will use that knowledge to his benefit. On this point, however, men and cats differ: a cat's ability to learn the laws of physics (such as the pain a hot stove lid gives) is limited to *his own* bad experience; whereas men enjoy the added ability to learn about law from observing, hearing about, or reading of the bad experiences of others. Thus, with both cats and men, experience is a good teacher. The cat, however, learns only by subjective experience; men learn not only through subjective experience, but also by objective learning of the experience of others. Referring to mankind's ability to learn through the experiences of others, the apostle states of Scripture, "[T]hese things were formerly written for our learning."[1433]

In summary, men loosely call the individual's natural ability written of in *Romans* 2:14–15 *natural law*. The law, however, is not that which is

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[1432] *See* J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW 14 (2003).

[1433] *Romans* 15:4. Greek εις (*eis*): *with a view toward* our learning, i.e., with our learning in mind or "yearning for our learning." *Eis* appears only with the accusative case, denoting movement toward a certain object, in this case, a directed purpose . Further, used only in the accusative case, *eis* is definitive, not causative: viz., this and no more. God has provided Scripture for our benefit through learning its concepts. "God's textbook," said Ulrich Zwingli, "is the Bible, and God the Holy Spirit is the true teacher of His people." See generally WINTERS, *supra* note 39, at ch. 6, for exposition of the Holy Spirit's method of teaching revealed in 2 *Timothy* 3:16.

natural; rather, it is the individual's *ability to discern the law* that is natural. Natural law is the potential to know right from wrong, but not the knowledge itself. Whether latent or patent, each person possesses such ability, which, by its exercise, can grow and refine.[1434] Natural law as understood in civil law's scholasticism, however, rests upon a false premise: mankind's fall into sin merely arrested and neutralized his ability to reason, but never debilitated it. Thus, the scholastic reasons, the pure logic of the human mind, having never fallen below neutrality and into depravity, remains the reliable fountain of law.

This most-basic premise of civil law still dominates the modern understanding of natural law. The scholastic elite, or so the civil law teaches, by their training and determined exercise of their will, are able to free themselves from bias and produce good law, according to the civil-law definition: definitions of right and wrong in the form of commands, universally and uniformly applicable to all men. Thus, scholasticism denies that faith in God by trusting His written Word are necessary to apply the discernment between good and evil to one's life: the delusion that seduced Adam and still seduces his descendants.[1435]

[1434] *See Hebrews* 5:14. In keeping with the necessity of outward and tangible evidence in this age of man's administration of law and government, the writer to the Hebrews uses terms indicating that in order for man to recognize the inward, intrinsic qualities of good (*αγαθος: agathos*, such as good intent), he must understanding its outward, extrinsic evidence (*καλος: kalos*). Mankind will discern the good intent from bad intent in others only by observing their outward fruits. In the same fashion, to discern the inward condition of evil (*πονθηρος: ponayros*) man must observe and learn the meaning of its outward manifestation (*κακος: kakos*). By using the terms *kalos* and *kakos*, the writer to the Hebrews stresses that man discerns good from evil only by learning to rightly interpret outward, extrinsic evidence.

By making this point, the writer excludes the notion that spiritual discernment is a wholly subjective feeling, unrelated to objective discipline. By common grace, God has stamped into every member of Adam's race—at his natural physical conception—the potential to learn right from wrong. By specific grace, God stamps into His sons and daughters—at the new and spiritual birth—the potential discipline to practice, cultivate, and obey this knowledge. *See id.*

The foundation of all law and government lies in a country's sense of deity. One discerns a country's sense of deity by discovering to whom that country attributes final, non-appealable authority to decide right from wrong; such determinations are law. This deity is often another man or woman, or the majority of a group of men and women such as a legislature, a court panel, or a nation. If this foundation is other than the God of creation, it is idolatry.

[1435] Adam's sin devastated Adam's descendants in every aspect: body, soul, and spirit. "Who gives a clean thing," asks Job rhetorically, "out of an unclean [source]? No one." *Job* 14:4. Because Adam was tainted, all his descendants are tainted. *See generally Romans* 5:14, *Hebrews* 7:9–10 (implying and proposing that the taint of the sin principle is transmitted seminally, beginning with Adam, from generation to generation. Consequently, all men and women of Adam's race receive the sin nature from the seed of their father). Although the female of Adam's race also receives the sin nature, she does not transmit it to

The Additional Ability Provided to God's People

Rotherham translates 1 *John* 5:20: "[T]he Son of God hath come, and hath given us *insight* . . . ."[1436] Young's translation is stronger: "[T]he Son of God is come, and hath given us a *mind* . . . ."[1437] The words *insight* and *mind* both translate *διανοια* (*dianoia*): the Greeks' term connoting possession of (1) the facility of mind (2) that rests a reliable major premise on compelling evidence (3) and uses this well-founded major premise for a syllogism, (3) *followed by* the rare ability to obey the conclusion of that syllogism. John the apostle's use of *dianoia* denotes Christian obedience: an act, stemming from faith, generated by reason, which the actor founds upon unquestionable fact. Indeed, natural law signifies the ability to arrive at truth through reason founded on revelation of fact. John, however, stresses a crucial additional element of *dianoia*: the further ability to act upon such conclusions with unswerving steadfastness. Though Adam's entire race has the natural ability to arrive at truth through reason founded on revelation, only God's redeemed have the potential, by faith, to persistently act on those conclusions.

A comparable term for John's *dianoia* is the Hebrew *chacam*:[1438] a major theme in *Proverbs* and most often translated "wisdom." Though the New Testament sometimes uses the Greek *sophia*[1439] to carry the Hebrews' understanding of *chacam*, *sophia* differs from *chacam*: to the Greek, wisdom (*sophia*) is the natural and innate ability of every human to reason. To the Hebrew, however, wisdom (*chacam*) goes further, harnessing a willing horse to the traces of reason and hitching the other end of the traces to the plough of facts. *Chacam* is "the adaptation of what we know to what we have to do."[1440] *Sophia* is mental activity:

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the next generation by her seed; the man's seed transmits it. If one accepts this principle as consonant with Scripture, Mary, the mother of Jesus and an imperfect daughter of Adam, was able to give birth to the perfect and sinless Christ because Christ's Father is the sinless God. As the Holy Spirit, through imperfect yet willing men, begat God's flawless written Word, so also the same sinless Holy Spirit, through an imperfect yet willing woman, begat God's flawless living Word.

[1436] JOSEPH BRYANT ROTHERHAM, ROTHERHAM EMPHASIZED BIBLE (photo. reprint 1984) (n.d.) (emphasis added, capitalization in original).

[1437] ROBERT YOUNG'S LITERAL TRANSLATION OF THE HOLY BIBLE (Robert Young trans., Greater Truth Pub. 2004) (1862) (emphasis added).

[1438] Hebrew: חכם.

[1439] Greek: *σωφια*.

[1440] ROBERT GIRDLESTONE, SYNONYMS OF THE OLD TESTAMENT 74 (1897).

reason and reason's conclusions, but no more; *chacam*, however, shows faith by acting upon those conclusions.

In this Hebrew sense, the LORD Jesus grew in *wisdom*: i.e., the doing of what He had concluded though sound thinking.[1441] Man's greatest hindrance is immorality, not intellectual inability: he refuses to accept and follow through in obedience based on what he knows or can know. God has given every individual enough revelation and the intellectual capability to discover truth. However, to those born of the Spirit—His sons and daughters—God has given the moral pluck to persist in obedience to that truth.

§ 5.1.3
Due Process –*vs*– Scholasticism

Where men give Scripture audience,
Where nature guides and truth rules;
Men shall not take for truth and sense,
The pedantry of priestly schools.[1442]

Scholasticism is reason taught in the scholastic tradition. "Scholasticism, a form of Mediaevalism, was a method of systematizing . . . according to the rules of logic laid down by Aristotle."[1443] Moreover, Scholasticism is the lifting of human reason above all things, including God's Word written; scholasticism is the gist of humanism. The scholastic method was, and remains, indispensable to the veneration, interpretation, and application of civil law.

Vital to scholasticism is the doctrine of man's fall into sin in the Garden of Eden, which, says Rome, never impaired man's intellectual ability and will. If Rome is correct that man's ability to reason is unaffected by Adam's fall into sin, human reason can be reliable; if Rome, however, is incorrect, and man's reasoning ability is impaired by Adam's fall, man must never trust his naked and untested reason—the

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[1441] *Luke* 2:52. *σοφια* (*sophia*).

[1442] *Derived from* the poetry of George Berkeley, early English-Irish (English father, Irish mother) settler in Rhode Island. "In an era when the sufficiency of reason, at the expense of revelation, was confidently asserted, he [Berkeley] demonstrated that the church could outthink its critics." James Taylor, *Berkely, George* (*1685–1753*), *in* DICTIONARY OF THE CHRISTIAN CHURCH 122 (J.D. Douglas ed., 1978). One of Berkeley's chief goals was to defeat the materialism of his day.

[1443] 1 D'AUBIGNÉ, *supra* note 19, at 68. To be sure, Aristotle and the Greeks never invented, nor were they the first to recognize, the rules of logic. The Persians, the Egyptians, and the Babylonians, to just as great a degree, put faith in the human potential of raw logic.

scholastic method—to yield truth. According to Rome, as Thomas Aquinas "worked it out, man's nature at the fall did not receive corruption as much as injury by the loss of the superadded graces of holiness, righteousness, and so on. Thus . . . his reasoning power [remains] fully intact . . . ."[1444]

Rome holds that the individual's unaided reason remains fully able to free itself from self-serving bias and to accept truth, if the individual wills to do so; therefore, human reason unaided by divine intervention is trustworthy to produce true standards of law. Thus, devotees of Roman civil law accept Justinian's Code as though it were perfected human reason; further, they have believed, as a practical matter, that the properly trained theorist and civil lawyer is able to extrapolate justice from the Code by using his unaided reason to fill its gaps and omissions,[1445] or to wring them out of the Code's fabric.

Because the civil law relies on pedantic adherence to precision in logic—insufferable to the common lawyer—, it recedes from facts, which tempts resorting to legal fictions. No civil-law fiction is more common, accepted, and absurd than the use of *reason* and *will*, each to justify the other, and even substituting the one for the other. Thus, the two terms appear synonymous and confuse the two concepts. The civil-law state begins by commanding and finishes by enforcing its will, teaching that the greatest virtue is the will to force one's wants against others.

Human will is foremost in Rome's theology and civil law. "Romanism," says Van Til, "is jealous for the ultimacy of the will of man."[1446] Man conceives the civil law in his mind and according to his wants, fashions it by his reason. Thus, the legislator begins with his wants and ends with his will; he includes his reason in the process as a tool of justification. Man's reason and will, however, both suffer sin's effect: man will find the reasons to achieve his will; his cravings will then justify his reasons. "The ruling passion be what it will, the ruling passion conquers reason still." Pure reason in law and government amounts to raw will. In the civil-law tradition, the state's desire to act is reason enough to justify its actions. In short, will amounts to reason.

[1444] ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 66–68 (1974), *citing* ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHURCHES 283 (n.d.), *relying on* KARL WERNER, DER HERILEG THOMAS VON AQUINO (1859).

[1445] See generally § 2.8.2 of this book (discussing Rome's veneration of Justinian's Code as perfected reason).

[1446] CORNELIUS VAN TIL, CHRISTIAN APOLOGETICS 12 (1976).

Common law, on the other hand, fashions applications of its first principles out of the furnace of adversity and onto the anvil of litigation, where cross-examination shapes the evidence before the Jury:

> The common law is as a result of a natural sequence . . . *It did not come about as an act of will*, as an act of some group aware only of the instant moment, unaware of the nature and history of man. It came about as a result of a seamless and continual weaving.[1447]

In contrast to civil law, the zeal of the common law is for right relationships, not the state's will as expressed through the expert's reason, which the state then justifies through enforcement power. Human will and reason are supreme in scholasticism and civil law; but the common law approaches legal disputes by first determining categories of relationships and then articulating the duties that arise from these relationships, with adverse parties testing fallible human reason against the practical wisdom of revelation, history, and experience as set forth by appellate case precedent.[1448] Put another way, common law's measuring stick used to judge human behavior is the eternal law discovered through its adversarial process conducted in a fundamental distrust of human reason. By contrast, civil law's ultimate measuring stick is the will of the state as justified by the scholar's reason: the expression of humanism in law and government.

[1447] WALTER BAGEOT, THE ENGLISH CONSTITUTION 229–30 (n.p. 1867), *quoted in* Peter Landry, *The Common Law: Tradition & Stare Decisis* (visited 21 Nov. 1996) <www.blupete.com> (emphasis added).

[1448] *See Proverbs* 3:5: "Contentedly rely [בטח (*batach*): a secure feeling of confidence] upon the LORD with all your heart, but you shall not lean unto your own understanding [בין (*bin*): the unaided, subjective ability to distinguish right from wrong]." God desires man to rely upon His Word, testing all choices against the distinctions set forth therein. See generally §§ 4.5.1–4.5.2 of this book (providing examples of such tests). *See also* 2 *Corinthians* 10:5: "Continuing to pull down *reasoning* [λογισμος (*logismos*): the art of abstract reasoning] . . . ." (emphasis added). Some translate *logismos*, "vain imaginations." Scholasticism is an example of such faith in human reasoning.

§ 5.1.4
Facts –*vs*– Speculation

The French are logical, the Irish are logical, the English are essentially not a logical people, yet they have made a greater contribution to the cause of human liberty . . . than all the rest . . . And no one unaware of this can ever understand the growth of the common law and the development of the principles of equity.[1449]

"If ever a system was riddled with illogical analysis," says Turner, "it is the common law."[1450] Because the common-law tradition concerns itself foremost with protection of relationships and vindication individual rights, the common law centers upon the courts: the triers of past happenings, viz., facts. Common-law courts have always "recognized the great genius wherein the English often used illogical systems with functionally beneficial results."[1451] Because the civil-law tradition, on the other hand, concerns itself with vindication of the will of the state, the civil law centers upon legislators: those seeking to preempt future events, i.e., speculation.[1452]

[1449] STRYKER, *supra* note 48, at 262–63. Of the use of logic among the French, there is no clearer example than that of Fredric Bastiat. Bastiat understood the dangers of scholasticism, the scholar-legislator, and the ruin inherent in worship of the scholastic class. Further, Bastiat had the developed ability to express his understanding neat and clear. Knowing the danger of raw legislative power, he placed the English Parliament and the French legislature in the same category. *See* BASTIAT, *supra* note 701, at 18. Bastiat takes the view of the common lawyer; however, being overwhelmed in the French civilian culture he omits emphasis upon independent courts and the unique character of the British Parliament.

Bastiat attributes the false equation of *law* and *legislature* to classical thought and education. "Conventional classical thought everywhere says that behind passive society there is a concealed power called *law* or *legislature* (or called by some other terminology that designates some unnamed person or persons of undisputed influence and authority) which moves, controls, and benefits mankind." *Id.* at 36–37 (italics and parenthetical in original). In the civilian (civil law) culture, such a person or persons of undisputed authority are mere men; in the common-law tradition, on the other hand, the only one of undisputed authority is the person of God against whose character and Word every man and each woman are to weigh human expressions and behavior of right and wrong.

[1450] GEORGE M. TURNER, IRREVOCABLE TRUSTS 21–4 (1996).

[1451] *Id.* As is the Christian teaching of the deity of the man Jesus Christ (100% man and 100% God), the common law, though often defying logical analysis, is not contradictory. For example, common-law joint tenancy says that two persons can each own 100% of a piece of property. Thus, upon the death of either, the survivor remains the complete owner.

[1452] Judgments based on speculation dressed up in scholarship are abhorrent to the common law: "Decisions of questions which may arise upon the happening of events in the future . . . must await those events." Flye v. Jones, 283 Mass. 136, 138; 186 N.E. 64 (1933). Even when a common-law court sits in equity and must speak to a future event, the court order judging the matter must rest on proof of certainty that the event shall occur. In re

Civil law seeks the comfort of certainty in the present by applying the law to the unpredictability of human behavior in the future. Thus, the civil law's theory of legislation is a speculative science so-called concerning human behavior, "an intellectual speculative movement" aimed at giving to man "certainty . . . ."[1453] In pursuit of this illusive target, the civil-law state pre-designs legislation, using precise logic, in attempt to govern and even preempt human behavior. Thus, the legislature codifies statutes, which the judge then applies mechanically under a policy meant to uphold the legislative will.

The common-law tradition, on the other hand, allows the court discretion to tailor the law's principles to the past events and circumstances of the case before it. The common law, in its final determination at trial, asks and answers the question of fact, "What happened?" and then tailors the application of the law to those facts, as the Jury finds them. Logic seldom trumps fact. On the other hand, the civil law, by legislation, predicts what could happen and the civil-law judge fits the facts into the scholar-legislators' statutory forms. Common-law courts uphold legislation where constitutional; civil-law tribunals always uphold legislation. Civil law understands legislation as commands; its judges function as do bureaucratic clerks: confined to the statute and without discretion to do justice, even where the statute works injustice.

The humanist's passion for logic in his quest for certainty, says Merryman, was the source of France's construction and adoption of the metric system[1454] and of their systemized, rigid, and strict legal code. The civil-law quest for instant precision remains alien to the common-law tradition. The common law loathes cold-blooded logic: that is, logic

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Deed of Trust of McCargo, 652 A.2d 1330, 1337 (Pa. Super. 1994), *cited in* ROUNDS, *supra* note 363, at 17.

[1453] EARLE E. CARINS, CHRISTIANITY THROUGH THE CENTURIES 254 (1979). Carins directs his comments toward the scholastic movement of the Roman Church and state. In attempting to achieve certainty for the future, the civil-law tradition pursues detailed legislative control of human behavior and relationships. Such passion for certainty in control of human affairs during the French Revolution, says John Henry Merryman, brought about the metric system. Civil law's quest for certainty arises out of a drive to replace the individual's non-delegable responsibility to discern right from wrong with the precise will of the state. Nevertheless, certainty remains an illusion, even to the ardent religious humanist. *See, e.g.*, JOHN DEWEY, THE QUEST FOR CERTAINTY 191 (1929). Though Dewey acknowledges that certainty is an illusion, he nonetheless maintains his utopian aspirations for humanity through religious humanism and his awe of democracy, with its ever-present handmaiden meant to provide legal certainty: the scholar-legislator.

[1454] See generally 4.1.6 of this book (providing examples showing the different mind sets behind the metric and English systems of measurement).

divorced from a warm-blooded respect for personal relationships, for the obligations inherent in them, and for the individual's devotion to duty.

The civil-law state, however, exacting evermore-precise control, pursues detail in legislating its will. Nevertheless, since human behavior is often unforeseeable, the state's tribunals must apply law comprehensively, uniformly, and in disregard of human relationships. Put another way, no matter how precise the statute, the civil-law judge will encounter a case, requiring him to force its facts into the stricture of the statute, whether it fits or not. This forcing of facts need never plague the common law because its understanding embraces more than legislation: court recognition of first principles in protecting relationships are final.

In the civil-law tradition, only the state has the power to make law; it recognizes no other source. This legislative cartel of law making includes law's application: a monopoly on the power to dictate human behavior. "The [s]ocialists," says Bastiat, "[w]ish to [p]lay God [and] look upon society as an artificial creation of the legislator's genius . . . To these intellectuals and writers, the relationship between persons and the legislator appears to be the same as the relationship between the clay and the potter."[1455]

Modern civil-law systems attempt to blunt the harshness of the civil law's absolutist tendencies by rearranging the superstructure. Yet, time has failed to disturb the foundation of controlling notions upon which the superstructure rests: exaltation of the scholar for his abstract reason, honor to the legislator for his wise expression, and disdain for the judge, relegating his role to veneration of the scholars' abstract reason and obedient confirmation of the state's legislative will.

The state trains civil-law judges to enforce state legislation; judges are not educated to exercise discretion. In the civil-law tradition, the will of the state arises out of the abstract reason of the scholar and through legislation; in the common-law tradition, authority emerges from laying bare the truth through adversity in real conflicts over real violations of real rights. Discretion is the responsibility of the common-law judge and jurors; strict obedience is the business of the civil-law judge: he operates as a positivist.

Legislation has legitimate function; in the common-law tradition, the legislator is duty bound to curb the courts and the executive. The weakness of legislation, however, remains: legislation is man's attempt to

[1455] BASTIAT, *supra* note 701, at 34–35.

prejudge a future of facts, affairs, and relationships of which he is ignorant. Human hindsight, on the other hand, approaches twenty-twenty vision. Man, therefore, judges best in retrospect; by contemplating the known past, he best provides reliable principles for the unknown future.[1456] The gist of legislation is to contemplate and control

[1456] A man will not find truth in himself to guide his future. "Mankind's [אדם:*'adam*] way," says Jeremiah, "is not in himself, nor is it in a walking man to direct his steps." *Jeremiah* 10:23. Man possesses neither the right to, nor the light to, nor the might to determine his future. It follows, therefore, that man ought never presume to judge his future; for to do so he must rely upon his reason alone; facts concerning the future being yet unavailable, he, in at least some degree of ignorance, must speculate. Legislation, therefore, by definition, is speculation; speculation by itself is unworthy to rely upon to achieve justice, i.e., where an individual's life, liberty, or property is at stake. In this present age, it is man's duty to administer justice by means calculated to achieve not only justice, but in addition, to gain the confidence of men that justice has been achieved. The courts, therefore, owe justice to the parties before the court based upon visible and hearable evidence of facts and never upon the speculative calculations of reason alone: science so-called. *See, e.g.*, 1 *Timothy* 6:20–21.

Under the common-law principle requiring objective evidence of fact, our Supreme Court has held that the appearance of injustice creates the presumption of injustice, thus violating due process. Without requiring evidence of fact, courts forfeit the appearance of justice and thereby forfeit, in addition, the confidence of men. "[T]he *appearance* of justice," the Supreme Court has often said, "is as important as the reality of justice . . . its absence violates due process. Delvecchio v. Illinois Department of Corrections, 8 F.3d 509, 515 (7th Cir. 1993). Even God's Word justifies God's judgments by setting forth facts for the eyes of men. *See generally James* 2:18–26 (distinguishing between God, who knows the inward faith without waiting for the fruit of obedience, and men, who require the evidence of fruit to be convinced of inward faith). Our common-law courts are courts of real evidence, so that their findings are verifiable: being tangible, real evidence is publicly known and palatable to those subjected to their judgments.

The traditional common law accepted that God has revealed His will by two complimentary facets of His Word: creation (God's Word unwritten), publishing the general mind and majesty of the Godhead to all men; the Bible (God's Word written), illuminating the minds of certain men to the particular mind and works of Christ. Despite creation's beauty and wonder, its revelation brings universal condemnation to all by providing general notice of the Godhead's glory and power. *See Romans* 1:18–32. God's written revelation provides particular salvation to some by establishing the specific evidentiary record of the Father's love and authority to *the one willing* (*'ο θελων: 'o thelown*) to trust His Word. *See Revelation* 22:17.

In short, creation is God's revelation of condemnation; God's Word written is His revelation to salvation. See generally *Romans* 1:17–4:25, for the general *condemnation* of all men based on God's revelation of His power through His creation and the specific *justification* of certain individuals through God's written promises. According to Christ, the Word written is the official forensic record of God's testimony.

In *John* 3:10–13, Jesus encountered Nicodemus, a member of the Sanhedrin, Israel's supreme appellate court. In the course of conversation with Nicodemus, Jesus reviewed the fundamental principles of the law of testimonial evidence. *First*, in order to be *admissible* (*λαμβανω, lambano*: the verb root used for "receivable") the one giving testimony (the witness) must demonstrate its reliability by showing his competence. *Second*, in order to be competent, the witness must testify out of knowledge gathered from his *personal sphere of perception* (*οραω, orao*: this term is never used without objective mental consideration

what one believes will happen; the gist of the common-law courts is to ponder what did happen. The common law leaves aside philosophical discussions of scholasticism. "[W]e concern ourselves," said John Wyclif, "with the verities that are, and leave aside the errors which arise from speculation on matters which are not."

Civil-law government bases its power upon, and decides court cases according to, the will of the state, most often expressed in legislation: codes, statutes, regulations, and decrees. The debates preceding the adoption of the French Civil Code reveal the civil law's veneration for legislators: "[T]he legislator . . ." declared Toullier, "has no need to pretend, he commands."[1457] Civil-law culture likens the legislator "to a gentleman giving instructions to his servant."[1458]

On the other hand, the common law presumes each case and the manner in which any particular law applies to that case, unique. The court, therefore, must weigh up each case on its merits, articulating the law precisely and tailoring it to fit the facts closely. As common lawyers used to say, every tub must sit on its own bottom and every skin must hang by its own tail. Law confines common-law courts to consideration of justice concerning the parties before the court; the court is to draw its opinion narrow. In this way, the court will avoid temptation to concern itself with the affect its opinion will have on future cases and thereby risk miscarrying justice respecting the parties at that moment before the court.[1459] By concentrating on the case at hand, precedent for the future is best established.[1460]

[*οιδα: oida*] of the object seen). Jesus had contemplated well that which He had seen and that of which He testified to Nicodemus.

Using the same Greek terms in 1 *John* 1:1–4, John the apostle further confirms these principles of evidence. Then, in 1 *John* 5:10b–12, John states that God's written Word testifies that God has given to us eternal life, that this life is in His Son: the one having the Son has this life, but the one that does have not the Son of God has not this life.

[1457] L.L. FULLER, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 542 (1930–1931), *quoting* LECOCQ, DE LA FICTION COMME PROCÉDÉ JURIDIQUE 251 (1924). From this attitude arose the class *elite* and the French belief known as *elitism*: state control of society by elitists: the favored class of those enlightened.

[1458] *See id.*, *quoting* Somló *in* "Juristische Grundlehre" 544 (2d ed. 1927).

[1459] Some consider appellate courts, including the United States Supreme Court, to be policymaking courts. Appellate courts sometimes make findings motivated by economic and political policy. Nevertheless, because policymaking is a prospective activity (speculation), common-law courts rightly leave policymaking to the policy (*police*) powers of the state legislatures; to do so is to remain within the common-law tradition and within the bourn of the Constitution.

A common-law judge insures his freedom from the fickleness inherent in politics by focusing his discipline on delivering justice exclusive to the parties whose interests are before the court: individual rights of life, liberty, and property, in that order. Enjoyment of life depends upon liberty; enjoyment of liberty depends upon one's rights in property and

Men cannot conjure true law from a lesser being, but must seek it from the eternal counsels of God.[1461] For this reason, Blackstone referred to the pronouncements of common-law courts as *oracular*:[1462] a common-law practice reaching back to Anglo-Saxon and Jute (Dane) tribal law.

As the ancient tribal moot assembly discerned right from wrong in particular cases, consistency among cases of like facts became discernable, and then recognized as custom to be followed in future cases. Then, after written English became available, as the Jury and judge rightly applied the law in a particular case, that written opinion became precedent for future cases. Further, nowadays in common-law countries, if a party shows that another case opinion is more fitting to the case at hand, or that the case opinion offered is error, then the courts even acknowledge that since previous courts have misapplied the precedents, future courts shall not follow that previous errant finding.

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his property in his rights. Common-law courts must consider policy only as it becomes an issue before the court in retrospect, i.e., where that policy has injured a plaintiff. Over time, the best policy will emerge as courts narrow their consideration to the rights of the parties before the court and the dispute at hand. "[T]he court does not have a license [to judge] in the interests of what the court judges to be sound public policy; the court's role is . . . not to make a freewheeling policy choice. Buckley v. Fitzsimmons et al., 509 U.S. 259; 113 S. Ct. 2606; 125 L. Ed. 2d 209 (1993).

[1460] The Supreme Court's dissenting opinion in *Blakely v. Washington* speculated that the Court's majority opinion will create too much litigation: as to the parties before the Court, the dissent was willing to sacrifice justice for the parties before the Court on the altar of expedience and ease of judicial administration. This majority finding has corrected a good many individual injustices in violation of the right to trial by jury. *See* Blakely v. Washington, 542 U.S. 296 (2004).

[1461] The common-law tradition has always held that law is discoverable, but never made. Some, however, attempting to relegate this ideal to the dustbin of legal history now call this principle a legal fiction. Though the common law speaks of a courts' *findings*, they say, such words are merely habit of tradition; everyone knows that judges do not seek and discover the law, but instead manufacture the law according to their cravings and biases. Nonetheless, to abandon the ideal that law is truth, truth is eternal, and its right application must be sought and discovered, throws a people and government back upon those who administer the state as their lawgivers and final arbiters of right and wrong—a deplorable dependency, destructive of human personality.

[1462] *Oracular* stems from the old French *oracle*, meaning "a divine pronouncement": words delivered directly from the mouth of deity or through the mouth of one commissioned to speak the words of deity, such as a prophet. *See, e.g., Deuteronomy* 4:12, 15, *Matthew* 17:5.

§ 5.1.4.1
Court Findings –*vs*– State Legislation

Digests and codes imposed in the Roman manner by an omnipotent state on a subject people were alien to the spirit and traditions of England. The law was already there . . . and it was only a matter of discovering it by comparison of recorded decisions in earlier cases, and applying it to the particular dispute before the court . . . English justice advanced cautiously.[1463]

A court ["d]ecision," says Justice Stone, "[draws] its inspiration and its strength from the very facts which frame the issues for decision."[1464] By contrast, legislation in a civil-law country is not a by-product, but rather, the first work of the legislator; he is the fountain of the law and his legislation is the fountain of all else. Moreover, he means his statutes to control future behavior and not—as in the common law—to settle a certain disagreement over past events. In brief, issues of fact control the common-law tradition; speculation controls the civil-law tradition.

The common law and civil law look for law in different places: the common law looks to case law, statutory law, custom, and first principles; the civil law looks only to its Code. Moreover, in the common-law tradition, written court opinions are evidence of the law;[1465] in the civil-law tradition, the imperial Code *is* the law—no small distinction because evidence of the law is subject to challenge, whereas the law itself is never open to challenge.

Even where common-law and civil-law duties, prohibitions, rights, and responsibilities are alike—and they often are—the methods of beginning the dispute-resolving process in the two traditions rests upon different assumptions (presuppositions) and travels from opposite ends. For example, the common lawyer first searches out the most recent appellate opinions having authority over the court,[1466] with facts akin to

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[1463] CHURCHILL, *supra* note 62, at 164.

[1464] Harlan Fiske Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 6 (1936).

[1465] The common law's distinction between the evidences of the law and the law itself bears repeating because it is fundamental to *stare decisis*, the polestar of the common law. The past shows that common lawyers tend to forget this distinction. By letter published in the *London Evening Post* on 14 November 1770, the anonymous writer, pen name Junius, criticized the Chief Justice of the King's Bench, "[W]e see the same bias and inclination to depart from the decisions of your predecessors, which you certainly ought to receive as evidence of the common law." HEWARD, *supra* note 386, at 129.

[1466] For example, Congress has divided the United States into eleven geographic federal appellate jurisdictions; each American state legislature has divided its state into state appellate jurisdictions.

the case before him, to serve as guiding precedents.[1467] In this task, analogy is the common lawyer's chief tool; necessary to the exercise of *stare decisis*: the polestar of the common law. "[Appellate] [d]ecisions," said Lord Reid, "are always authority for other cases which are reasonably analogous and are not properly distinguishable."[1468] Before venturing further, the common lawyer, by analogy, distills the consistency of the law's application through time:

> The difference between the common-law tradition and the civil-law tradition of the European continent and Latin America must be repeated for emphasis. We must be aware of the distinctive methodology and hierarchical disciplines of the two systems. In the civil law countries, the legislative Codes . . . are the sole sources of decision; theoretically, in every case, recourse must be made to the language of the Code. And *in every civil law jurisdiction* the relevant provision of the Code becomes the major premise in the categorical deductive syllogism. In common-law countries the concept of *stare decisis* governs. *Stare decisis* demands that lower courts follow decisions of higher courts in the same judicial hierarchy. The tradition also demands that the most recent higher court decision be followed . . . In the United States, unity of judicial action is ensured by the rule that a court may not deviate from precedents established by its hierarchical superior.[1469]

[1467] See generally § 5.1.4.2 of this book (suggesting that the presence or absence of legislative codes and statutes is not the basic difference between the common-law and civil-law traditions).

[1468] Shaw v. Director of Public Prosecutions (1962) A.C. 220, dissenting.

[1469] RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 11 (1997) (emphasis added). Judicial *fairness* includes evenhanded application of the law's protection. By following precedent, the common law achieves equal protection of the law as constitutionally required. *See* U.S. CONST. amend. IVX, § 1. The Constitution's Equal-Protection Clause rests upon the common-law custom to remain by things decided, unless absurd to do so. *Stare decisis* is the abbreviated form of the proverbial rule *stare decisis et non quieta movere* (to stand by the decision and not disturb quiet [established] things); so it is said: *Let sleeping dogs lie*. William Blackstone, summing up this matter, declared the common-law ideal that has been held through the centuries: at common law, it was "an established rule to abide by former precedents" unless they are "flatly absurd or unjust." *Stare decisis* remains the customary common-law rule to which courts in the United States adhere.

The civil-law judge—known as an *ordinary judge*[1470]—begins his analysis of a case by accepting the Code's statue and the application provided. By tradition and without question, he holds the Code as the starting point and simply reasons down (deduction) from the Code's specific command to the facts of the case before him. By this design under the Code's all-embracing dome, he decides what he believes are the particular facts of the case before the court. Civil-law[1471] culture and training have bred an unquestioning loyalty to the Code into his thinking; social and political pressure maintains it.

In reaching decisions, civil-law judges of South America, Central America, continental Europe, and Asia operate mechanically, in upholding the state's legislation by confining their consideration of legal disputes to the four corners of the Code, whether called statues or regulations. For example, civil-law analysis moves from beginning to end in the following pattern: the Code decrees that every person who steals money shall be imprisoned for ten years (universal major premise);[1472] the judge decides that John Doe stole money (particular facts forming the minor premise); therefore, the judge must imprison John Doe for ten years (conclusion).

Courts in the United States often follow this same pattern of analysis in using regulations: civil-law tools that have crept into common-law countries.[1473] Though the major premise of the Code often appears clear, the confusion of facts constituting the minor premise are just as often as obscure as they are unpredictable, rendering the conclusion unsure. The civil-law judge, therefore, "is compelled to force new situations, which bob up out of the eternal flux of reality, into the confining framework of an existing intellectual apparatus":[1474] the confining language of the Code.

[1470] The designation *ordinary judge* began wide spread use in France. In Roman law of both church and state, "ordinary" denotes a judge having jurisdiction by right of office, such as a probate judge. This civil-law designation has found its way into England's Court of Appeals, known as the Lords of Appeal in Ordinary, and some American state equity courts.

[1471] See generally § 2.7.3 of this book (discussing the civil lawyer's fundamental attitude toward the civil-law Code).

[1472] The major premise of the civil law is the *fiat* of a human legislator or legislators: the provision of a statute.

[1473] Common-law courts, however, still subject criminal codes to review for constitutionality, especially in their specific application. Criminal law in the United States, though fraught with codes and regulations, remains subject to judicial opinions and interpretation.

[1474] L.L. FULLER, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 525 (1930–1931).

The common-law tradition, on the other hand, while requiring that the judge and lawyer remain respectful of legislation,[1475] also requires that each one exercise independent judgment toward its application. The common lawyer remains duty-bound to acknowledge legislative fallibility and never blindly accept the legislature's language as complete, unambiguous, or accurate if doing so leads to absurd conclusions or otherwise works injustice. Legislation is sometimes unlawful as enacted; at other times, though lawful in principle as enacted, the courts apply it unlawfully.

Because the common-law tradition maintains empirical roots in the past, it benefits the present. It demands testing of legislation and its application through court-fashioned rules of law, precedent, jury verdicts, and due process. Additional safeguards, such as the independence of the judiciary, encourage the common lawyer's confident use of these. The civil law, on the other hand, limits the function of the judge to strict application of the statute according to cold rules of logic, abstracted from all else. Further, common-law court opinions trace the history of the applicable principle to show how the court's present opinion figures into and continues that consistency. These opinions are not the law, but instead, possible *evidences of the law*,[1476] articulating the law's precise application. Based upon these evidences, he is able to apply the law in keeping with how previous courts have applied it to like relationships and affairs.[1477]

[1475] As applied in the United States, the common-law tradition limits state and federal legislatures to enacting statutes that fall fully within the boundaries marked out by the federal Constitution and applicable state constitutions. In common-law countries, legislation enjoys the presumption of lawfulness; the burden of proving unlawfulness rests on the challenger. Following the domination of America with all-embracing administrative law, duly promulgated regulatory schemes now also enjoy this presumption of lawfulness.

[1476] Common-law litigation aims at answering two questions. *First*, what are the facts? Simply put, what happened? *Second*, what is the applicable law? In one sense, the answer to both questions demands discovery of facts through evidence: parties present physical evidence and testimony as evidence of the facts of the case; parties present agreements, court opinions, custom, prior conduct, and legislation as evidence of law of the case. The boundary between fact and law sometimes overlaps, is non-existent, is arbitrary, or a fiction. The applicable law becomes the major premise; the facts of what happened become the minor premise.

[1477] If a party before the court believes that the court has failed to discover and apply the proper major premise in a manner harmonious with past cases (*stare decisis*), he will base his appeal on the court's failure to protect his right to equal protection of the laws under the Constitution. Because the Code is supreme in civil-law states, if the judge is unable to find a Code provision neatly fitting the facts of the case before him, he has two choices: sweep the facts of the case into the undiscerning control of broad and vague legislation; or, using the lubrication of a legal fiction, grease the facts of the case and using the hammer of legislative

To find the rightful principle of law for application in a particular case, the common lawyer, in independent judgment, ponders the gathered appellate opinions that are akin to the case before him and discerns the consistent principle threading through them.[1478] He traces the principle as he proceeds through the opinions chronologically, testing each application of it against his understanding as he proceeds. The applicable principle forms his major premise. Then, from this major premise, he reasons down (deduction), using the facts of the case as his minor premise. The common law's foregoing method of analysis is all in observance of *stare decisis*: the polestar that the courts must keep in sight in order to steer a true course:

> This idea [*stare decisis*] . . . is picked up in the [common] law, as it exists today. When a court decides a case it does so on the merits of the case before it. The court's decision is meant to only effect the rights of the parties, the litigants, before it. The court, however, is obliged to apply settled principles of law. The decision of any respected court amounts to a recap of the law needed to resolve the case before it. The law as it is used in the particular case has an universal applicability to all future cases embracing similar facts, and involving the same or analogous principles. These decisions, many being years and years old, thus became statements of law, to be applied by all courts when measuring the private and public rights of citizens. It is this stream of cases, within the arc of the great pendulum of time, which changes the banks of the law: the common law, thus, as it turns out, is a living, creeping creature.
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> Do not, however, be mistaken—there is a conscious effort by those involved (lawyers and judges) to keep the law pure:

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supremacy, drive them into a narrow slip of the Code's provision. In either instance, he disregards the law's fair and fitting application.

Judges in the civil-law tradition are never the law's interpreters in the common-law sense: they do not exercise discernment in independent judgment, but, rather, provide mechanical application of the legislative will. The civil-law judge follows his positivistic training. As such, and even though discretion is unavoidable, his training is that of a clerk instructed to obey the language of the Code, regardless of the facts. Thus, his education aims not at informing his conscience in preparation to exercise discretion calculated to maintain fair play and achieve substantial justice, but to obey the state.

[1478] As pertains to the common-law tradition, the investigating lawyer reasons from the calculus of gathered case findings to a general conclusion that is harmonious with the sum of those findings.

> not to change it, but to apply it. This principle is called stare decisis, Latin, which literally translated means, "stand by things decided." *Stare decisis* has come to us as a most sacred rule of law. A judge is to apply the law as it is presented to him through the previous decisions of the court; it is not the judge's function to make or remake the law . . . .[1479]

The calculus of common-law precedents is akin to the making of a pearl. The common law has been, and continues to be, built up as is a pearl in an oyster: slowly and always in response to some personal aggravation. Court opinion upon court opinion builds up the common law gem "infinitesimal layer after infinitesimal layer," resulting in a finely shaped pearl called a *rule of law*:

> [T]hrough long continued and arduous labors, [the common law has] grown venerable with years, and interwoven as it has become with the interests, the habits, and the opinions of the people. [Without the common law,] in each recurring case [a court would] have to enter upon its examination and decision as if all were new, without any aid from the experience of the past, or the benefit of any established principle or settled law. Each case with its decision being thus limited as law to itself alone, would in turn pass away and be forgotten, leaving behind it no record of principle established, or light to guide, or rule to govern the future.[1480]

Over time, the common-law tradition shakes out the truth.[1481] For hundreds of years, the common-law courts have tested, observed, and adjusted application of its first principles.

In contrast, the civil lawyer and judges foundation is the *will* of the state—as expressed in regulations or legislative acts—to be the foundation, major premise, and point of beginning without testing these against higher standards articulated in constitutions or case opinions.

[1479] WALTER BAGEOT, THE ENGLISH CONSTITUTION (n.p. 1867), *quoted in* Peter Landry, *The Common Law: Tradition & Stare Decisis* (visited 21 Nov. 2005) <www.blupete.com> (emphasis added).

[1480] Peter Landry, *The Common Law: Tradition & Stare Decisis* (visited 21 Nov. 2005) <www.blupete.com>.

[1481] *See id.*

The civil-law tradition never binds its judges with case precedents. In fact, it forbids its judges from consulting any previous cases. Their training conditions them to mechanically apply the state's legislative will to the case before them. Nevertheless, seldom do the facts of a given case fit well into any provision of law. Consequently, if the facts of an issue force a civil-law judge to exercise discretion, his tradition and training demand that he exercise it by construing the facts in a light most favorable to the state.

By forcing all cases into a pre-formed legislative uniformity, the civil-law judge seeks to preserve the Code undisturbed. The state will never foresee and, therefore, is unable to address through legislative acts or executive decrees, every possible fact pattern that bobs forth from human relationships. In their attempt to keep judges from judging, legislators in the civil-law state either cast the net of legislation so wide that it embraces every possibility of human behavior, or they draw the provisions of legislation narrowly but in such profuseness that (in theory) nothing is left for the judge to decide.

Thus, because the power to judge legislation is abhorrent to the civil-law tradition, the civil-law state tends to both legislate broadly and promulgate ever-more-detailed legislation. In any event, by both methods, the state intends that the law remain stagnant; both methods leave nothing for judges to do but to enforce the legislative commands. The function of the civil-law judge, therefore, is not as much judicial as it is administrative and executive: to enforce the will of the state.

§ 5.1.4.2 Legislative Infallibility

> *Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society . . . its obligatory force is independent of its principles. The legislature . . . is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice.*[1482]

In the civil-law state, legislation is the supreme expression of law. The civil law's "retreat from the dogma of legislative infallibility has been a slow, grudging one."[1483] Any perceived retreat, however, such as France's

[1482] MAINE, *supra* note 639, at 24.
[1483] MERRYMAN, *supra* note 82, at 56.

Courts of Cassation (French, *Cour de Cassation*, from *casser*: to quash), set up to review legislation for constitutionality, has been no more than "a special instrument created by the legislature to protect legislative supremacy."[1484]

In the common-law tradition, litigants lay the alleged facts on the adversarial anvil with parties trying their case in the hearing, and under the eyes, of jurors and judge. Thus, litigants, jurors, and judges are the leading personalities of the common-law tradition. On the other hand, the leading actors of the civil-law tradition are the civil-law professor and scholar, "The teacher-scholar," says Merryman, "is the real protagonist of the civil-law tradition. *The civil law is the law of professors* . . . [I]t is reasonably accurate to say that the law in a civil-law jurisdiction is what the scholars say it is."[1485] By contrast, it is reasonable to say that the law as applied in any particular case tried in the common-law tradition is what the Jury of a dozen randomly drawn members of the neighborhood says it is.

For the first two-hundred years following our nation's independence, trial by jury remained central to our ideals of law and government; the county courthouse remained the symbol of the common-law ideals that protected our liberties of life and property. This focus, however, is now shifting; *county administrative centers* accompanied by swarms of officers and large prison complexes eclipse local courthouses. The decline of the local courthouse as the familiar symbol of government indicates a change in foundational ideals of government: away from the authority of the Jury and trials and toward state power by bureaucrats. As individual dependence upon the state grows, administrative law multiplies in the form of executive legislation called regulations. Moreover, the executive's tribunals, called administrative courts, draw our resources and dominate the landscape formerly held by common-law courts of real judges and the Jury. Dependence on the state compromises the power of private relationships, the power of the individual life, and the power of the Jury; trial by the state then replaces trial by one's neighbors.[1486]

To sum up, the civil-law tradition entrusts the making of law to the scholar and legislator. It is also the civil-law legislator's job to limit the

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[1484] *Id.* at 40.

[1485] *Id.* at 59 (emphasis added).

[1486] The purpose of trial is to decide whether to grant the government permission to use its power to enforce the judgment of the court against the loser. Since it is impossible for one to grant permission (that is, *license*) to one's self, any such attempted act is, rather, an act of *discretion.* Further, since government is without discretion to decide trials, trial ought never be by the government but by the Jury or, if a bench trial, by the court.

judge's role to that of a mechanic: the legislator confines the judge to the operation of a precision legal engine, designed by the scholar and built by the legislator to control the future. By contrast, the common-law tradition trusts none of these, but allows the law to emerge out of the forge and fire of litigation in retrospect of past events. Detached and speculative scholars are the center figures of civil law; adversarial litigants are the focus of common law. Civil law descends from the ivory tower of the university; common law is tested and proved in the county courthouse.

§ 5.1.4.3
Legislative Finality

Common law comes about at the root levels of society: it is not law that is imposed by some authority from on high. The development of common law was "essentially a private affair concerning millions of people throughout dozens of generations and stretching across several centuries." It is a process that is self adjusting and which goes on everyday unnoticed, without great expense to the state and without fractionalizing society. This is to be compared to the legislative process.[1487]

The essential difference between common law and civil law is not the presence or absence of legislative codes and statutes but lies in the finality that *civilians*—civil-law attorneys and judges—attribute to legislation. In fact, some common-law countries have statutes in greater abundance than some civil-law countries. For example, the United States, a common-law country, is overwhelmed with statutes and regulations; South Africa, a civil-law country is not so overwhelmed. Well-known common lawyers, such as William Blackstone, observe that common law consists of customs and court decisions (*lex non scripta*: the law not written) while civil law consists of legislation (*lex scripta*: the law written). In civil-law states, legislation stems from Justinian's *Corpus Juris Civilis*. Legislation, tradition, and culture restrict the civil-law judge to the language of this Code alone for a basis of his decisions. In a word, legislation is final; the courts may not test it, but must only mechanically apply it. Civil law's statutes carry an air claiming to have done away with the past, both of law and of experience.[1488]

[1487] Peter Landry, *The Common Law: Tradition & Stare Decisis* (visited 21 Nov. 2006) <www.blupete.com> (emphasis added). Canadian barrister, Peter Landry, cites benefits arising from the common law's stable method and steady development.

[1488] *See* MERRYMAN, *supra* note 82, at 32.

By contrast, common-law courts never expect legislation or codes to be complete or internally harmonious; the wise legislator in a common-law country will never make such a claim. Common-law judges stand ready to supplement legislation and codes with court-fashioned rules and proven customs. American courts never view our Constitution as comprehensive and fill the unaddressed gaps with common-law ideals. Thus, in this way the common law informs legislation. Legislation in derogation of the common law throws a red flag before common-law courts, demanding strict scrutiny for its lawfulness. In common-law countries, application of statutes remains subject to the common law's recognition of precedent (*stare decisis*) and the power of review by the courts for lawfulness.

Further, common-law courts and common lawyers do not consider the finely tuned rules distilled from case precedents to be final expressions of truth. They instead use these as measuring sticks (rules of law) until a case arises that demands finer tuning of its application. In this way, the courts sharpen the common law to finer discernment of rights and responsibilities, good and evil. By the common law's procedure, process, and method, the people enjoy the courts' application of first principles to an ever keener, yet harmonious, acuity, much as Scripture admonishes God's people to *whet* or sharpen the law to the minds of their children so that they will evermore-precisely discern good and evil.[1489] To *whet* the law means to apply it to real controversies involving real human relationships as opposed to abstract hypothetical stories. The battle for truth is in the mind and depends upon discipline that has become second nature.[1490]

Whetting or sharpening the law of God to one's mind is wholly unrelated to Hegel's dialectic theory of societal evolution used by revolutionaries to justify lawlessness. Societies, theorized Hegel, evolve upward toward utopia, following a sequence: as an idea or event (thesis) generates its opposite (antithesis), these opposites reconcile into a synthesis, which then generates its antithesis and the process repeats until all ideas synthesize into one, rendering the lessons of history, at that point, useless. Sharpening the law of God is never about the synthesis of

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[1489] *See Deuteronomy* 6:7. See generally WINTERS, *supra* note 39, at ch. 3, § 3, for an expounding and explanation of שנן (*shanan*): the Hebrew verb for "whet," in *id.*).

[1490] See *Hebrews* 5:14, where the writer uses *εξις* (*eksee-is*): meaning "habit," from *εχω* (*echo*). More precisely, *eksee-is* is possession of the habit that tirelessly trains the senses; in this sense, the writer to the Hebrews uses *eksee-is*. To the one who, by discipline, gains the "having" (*eksee-is*) of this habit, more discipline resulting in finer sensitivity between good and evil, right and wrong, shall result.

old ideas into ostensibly new notions and no need of history, but about sharpening one's understanding of the eternal sword of truth for heightened effect through precise application.

Lacking a ready term, common lawyers often use the word *exceptions* to signify the progressively finer distinctions that common-law courts draw in the application of law. Sir Francis Bacon—recognizing that these finer distinctions are not truly exceptions, weakening the rule but, instead, are the same standard applied to different facts—stated: *the exception to the rule establishes the rule in cases not excepted.* Common-law courts have recognized that true law never changes; only the facts and circumstances to which it applies vary: "The principle does not change, but the things subject to the principle do change."[1491] To achieve justice, therefore, one must discern the application of the law to differing facts in diverse circumstances, not only without abandoning the fixed principle, but also in vindication of it; to do otherwise is lawlessness.[1492]

§ 5.1.4.4
The Danger of Legislation

He was not a lover of statute law, "which seldom takes in all cases", but was an admirer of the common law, which he knew to be based upon principle and to be an instrument that could produce justice.[1493]

[1491] MacPherson v. Buick Motor Co., 111 N.E. 1050 (1916).

[1492] See generally *Romans* 12:2, wherein Scripture admonishes the individual to live with an eye toward (*εις: eis*) the purpose of the Christian life: the individual's duty to observe God's way—the determined will of God (*θελμα το θεου: thelma to theou*)—by distinguishing the unseen inward quality of that which is right (*το αγαθον, to agathon*: the good) from concealed wrongs, by consideration of objective proofs (*δοκιμαζειν: dokimadzein*). In short, the goal of the Christian life is to discern that which is right from that which is wrong; for this task, seeable evidence is necessary.

Holding fast to this duty, by this way, is the only reasonable response to Paul's indictment and one's justification (*see Romans* 12:1) and is the remedy he sets forth for injustice in *Romans* chapters one through eleven. From the human perspective then, the aim of the Christian life is to observe God's ways, moment by moment.

[1493] *Id.* at 181, *describing and quoting* William Murray. Significantly, Murray held that the common law has the potential to yield justice, not that it always produces justice. Murray, as William Blackstone, his contemporary and acquaintance, knew well civil law. Moreover, Murray's father and brothers were ardent Jacobites and served prison terms for their activities and convictions. Murray, therefore, came from a family bred to arbitrary principles: he understood the difference between common law and civil law, and made his choice in favor of the common law from a well-informed conscience.

Joe Canon, state's attorney for the east-central Illinois counties Douglas, Moultrie, and Coles, during the civil war, later became Speaker of the House of Representatives during the first decade of the twentieth century. While Speaker, Canon echoed—albeit in homespun American—Lord Mansfield's sentiments concerning legislation. "This country," said Canon, "don't need no legislation." Spoken above the viciousness of bitter class envy and fear

Blackstone understood *positive law* to be akin to *positive rights*. A positive right is never inborn in a person, but is rather, "a human institution; and the right inherent in him no [sic] natural, but a positive right."[1494] Thus, a positive right is the mere permission of the legislator: given by man, not by God. The one having the power to give, also has the power to take. Therefore, if man bestows rights by legislation, man can take those rights away by legislation. Positive law, then, is a decree contrived by the human mind and instituted, often without consideration of the Creator's authority, placing the power of domination in the hand of the state.

Legislation can be good, if lawful. The power to legislate, however, standing alone, as in the civil-law tradition, hangs the unpredictable threat of human caprice and power over a nation. H.S. Maine's definition of legislation rightly stresses its ever-present potential for lawlessness. When the writer refers to the concept of *legislation* in this book, he bears in mind its lawful use, but holds Maine's definition in view:

> Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society . . . its obligatory force is independent of its principles. The legislature . . . is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. [1495]

In a common-law country, the executive and judicial functions check the imperious breath of legislators. If the power of legislating falls into the hands of the executive, through regulatory bureaucracies, only the judiciary stands as a check. History shows that freedom will grow where there is an independent judiciary but no legislation. History is just as clear that freedom will fail where there is legislation without an independent judiciary. In short, an independent judiciary is indispensable to liberty; legislation is not. As does the wrong-headedness

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mongering, Canon's statement was dragged down into the kicking and biting, scratching and gouging of politics, was roundly criticized, and remains largely misunderstood. As did Mansfield, however, Canon saw the utter folly in relying upon legislators to foresee and make certain an uncertain future. Only God is worthy of such reliance.

[1494] 1 BLACKSTONE, *supra* note 12, at 202.

[1495] MAINE, *supra* note 639, at 24.

of the popular media, the wrong-headedness of judges frustrates truth. Submission of the courts, however, to the unbridled will of the legislature (as the civil-law tradition demands) is as fatal to freedom as is submission of newspapers to legislature.

Nevertheless, the civil-law tradition, founded in a fixed code of final authority, affords ready use and quick establishment of its political order. Because the Code addresses a moment in time, its tribunals do not require it to recognize finer distinctions and fashion new applications to meet new discoveries, as does the common-law tradition. The civil law offers the attraction of a completed product ready for immediate use and the illusion of predictability, but bears seeds of confusion:

> A code corresponds to the state of legal developments at a given moment and it aims to fix that state so that it will not be changed . . . The settled text can, at the very most, be the object of interpretation . . . The fixing of the law by codification causes internal contradictions and intolerable tensions within a society. Every codification therefore poses a dilemma: if the code is not modified, it loses all touch with reality, falls out of date and impedes social development; yet if the components of the code are constantly modified to adapt to new situations, the whole losses its logical unity and increasingly exhibits divergences and contradictions. These dangers are real, for experience shows that the compilation of a new code is a difficult enterprise that rarely meets with success.[1496]

[1496] ROUNDS, *supra* note 363, at 608, *quoting* R.C. CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 14 (D.E.I. Johnston trans., Cambridge Univ. Press 1992) (1998). *Referring also to* David Wesel, The Legal DNA of Economics, Wall St. J., 6 Sept. 2001, at 1 (suggesting that "rule-laden civil-law countries aren't well adapted to cope with change"). Law codes (so-called), being the result of deep-seated political rivalry, are by nature confusing. Witness, for example, the woeful confusion and inconsistencies of the United States Income Tax Code.

§ 5.1.5
Adversarial –*vs*– Inquisitorial

We should remember that in the "inquisitorial court" the roles of prosecutor, defender, and judge are combined in one person or group of persons.It is no accident that such a court commonly holds its sessions in secret. The usual explanation for this is that the methods by which it extracts confessions could not stand public scrutiny. But the reason runs deeper. The methods employed by an inquisitorial court, even if open to the public could scarcely be a subject of meaningful observation by an outsider. It is only when the roles of prosecutor, defender, and judge are separated that a process of decision can take on an order and coherence that will make understandable to an outside audience and convince that audience that all sides of the controversy have been considered.[1497]

Common law is an adversarial tradition of law and government; civil law is an inquisitorial tradition.[1498] As such, the common-law tradition tries cases; the civil-law tradition holds inquisitions. In the civil law's inquisition, the judge—not the attorneys—determines the scope of the tribunal's investigation and decides what questions he shall ask the witnesses. Thus, in a criminal inquisition, the civil law bars the attorney of the accused from defending his client's rights in any meaningful sense; the accused never enjoys the presumption of innocence; cross-examination is forbidden. The state's judge presumes the guilt of the accused, placing on him the burden to prove his innocence, a negative: that he never did the acts of which the state accuses him—an impossible burden.[1499] Thus, by the state's naked accusation, the accused stands before the tribunal for inquisition, guilty as charged; his life, liberty, and property are in the hands of a lone employee of the state, the judge.

By contrast, in the common law's adversarial tradition, each party—never the judge—determines his strategy for the contest; each deciding alone how to approach each witness, if at all. Therefore, in a common-law criminal trial, the law affords for the accused the tools to defend his rights; he enjoys the presumption of innocence. The common-law tradition demands that judge and Jury presume innocence, placing the burden on the government to prove guilt.[1500] The defendant is innocent

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[1497] LON L. FULLER, ANATOMY OF THE LAW 35–36 (1968).

[1498] See generally app. 31 of this book (showing distinctions between the inquisitorial Roman system and the adversarial common-law tradition, by contrasting the biblical concepts "day of man's judgment" with the "DAY of the LORD's judgment").

[1499] See generally § 5.1.10.2 of this book (discussing the common-law principle *innocent until proven guilty*).

[1500] See generally § 5.1.10.3 of this book (discussing the common law's reasonable-doubt

in the eyes of the law and, therefore, need never prove his innocence. It follows that if the government fails to meet its burden of proving guilt—and that beyond any reasonable doubt—, the defendant remains, in the eyes of the law, innocent. Thus, the common law distinguishes mere accusation from forensic, that is, real guilt; the civil law does not.

Thus, in the civil-law tribunals of places such as Central and South America, continental Europe and Asia, including Japan, the state's accusation equals guilt. Watching an inquisitorial court in operation will offend the person holding common-law sensibilities:[1501] the state presumes the accused guilty until he has proven his innocence, bars him from confronting his accusers, respects neither his right to remain silent[1502] nor his freedom to speak in his defense, forces him to testify against himself, and justifies emotional or physical torment to extract a confession. In short, in the civil-law tradition, the will of the state trumps all other considerations.

By contrast, in common-law courts, mere accusation, whether of torts or crimes, proves nothing; conviction demands conclusive evidence offered according to due process of law; the roles of prosecutor, defender, and judge are separate and independent; process is as weighty as substance. The common-law entails regular procedures called *due process*, which is due and owing to each individual coming before the court. Thus, litigants must conduct their courtroom combat according to pre-established and proper order. Whether by self-representation or through their lawyers, parties in a common-law court are adversaries, not

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burden of proof required for conviction in criminal trials).

[1501] It has pleased God to keep such an inquisitional system out of the United States. Americans ought to be troubled, however, when activist jurists cite law from civil-law tribunals—such as international courts—in an attempt to supplant common-law foundations. America, only by God's grace, has much to offer other nations in her adversarial tradition of law and government; she must remain busy pursuing the excellence of that tradition. America has been able to help others largely because God has seen fit to keep her tradition of common law and government distinct and isolated from the civil-law world's concentration of accusatorial power.

At times, church historians mistakenly present the inquisitional practices of the Roman Church as a papal innovation, but these were not. Rather, the civil law's inquisitional devices are as ancient as Babylon, founded upon the will of the imperial ruler as final and, thus, were natural fit for the imperial church's civil law. Civil law is imperial law: law that commands obedience to the state.

[1502] Historically, civil-law governments have used the confessional to extract information by coercion. Both the Star Chamber of the civil-law-minded kings of England and *conspiracy* the wicked offspring of the confessional: the prime tool of ancient Babylonian priestcraft. By contrast, due to the countering influence of the common law in England, and especially during the purifying years of the development of our common-law freedoms in the seventeenth century, the right to remain silent emerged in strength.

fellow laborers acting in concert to assist the judge in seeking his peculiar brand of justice. Due process allows the contest a fair opportunity to uncover truth; a neutral and independent judge is to insure that the parties follow the procedural rules of engagement and the long-proven-reliable laws of evidence.

Further, in the common-law tradition, the court has no prerogative to know the defense's trial strategy. Given the rough-and-tumble rigors of the adversarial trial, it is impossible for the jurors, the judge, defense counsel, or the prosecutor to know what truth will surface during the course of the conflict, especially while a witness is in the heat of cross-examination. During trial, all fibers of the mind, will, and emotion of those in the courtroom, including the jurors, can be drawn into play, creating an ambiance that can remove any resistance of a witness, change the strategy of the defense, or even humble the will of the plaintiff, prosecution, or judge. The impartiality of due process[1503] requires that judges not meddle in the process of litigation, reserving threats of incarceration for contempt until those decisive moments have arisen that give truth opportunity to break forth. In sum, our adversarial tradition depends upon loyalty to the fair play of due process and aggressive, yet engaging, litigants to sharpen the action and birth the unknown, and even unexpected, truth.

Civil law seeks to compound the judicial, the law making, and the enforcement powers of government in the single will of a legislative body or a chief-of-state; whereas common law takes great care to prevent commingling of these by insisting upon separation of powers—meaning, foremost, independent courts.[1504] The common law, by forbidding any one person from operating government, pits the separate and equal branches of government against one another in a balanced fashion. Common law tends to allot authority and, thus, scatter power. Civil law tends toward compounding and concentration of power; by which it seeks to gather all power into the hands of a single will.[1505]

[1503] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process. See further app. 24 (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by judicial passion).

[1504] See generally § 3.11.4 of this book (comparing and contrasting the English and American practice of separation of powers).

[1505] According to Scripture, the separation of powers maintained by the separate branches of government, is also fundamental to God's administration of government. Isaiah the prophet reveals that the Messiah is the only One in whom all three offices of government are rightfully concentrated: lawgiver, judge, and king. In this day of man's judgment, however, God forbids the offices of prophet, priest, and king—akin to our legislative, judicial, and executive powers—to all reside in the single will of one man or

Common law believes that an adversarial setting multiples opportunity for truth's discovery. Real controversies over real rights—where one's life, liberty, or property is truly at stake—result in heightened zeal that drives opposing parties to quicken their legal wits and sharpen the action: marshaling their evidence, mounting their attacks, and making defenses in the open daylight of a public trial. On the other hand, civil law believes that only the judge and attorneys are qualified to find the truth by applying the statute and their trained reason to the case, mostly in writing and, thus, hidden from public view. However, the life of the common law, whether in litigation or in government, is zeal of the parties over individual rights, quickening the spirit, sharpening the action, and uncovering the truth. Because it is adversarial, without clash of ideas, principles and people, the common law ceases life. Conflict is to the common law what a stiff wind is to a growing oak and modest trauma is to the bones and teeth. Adversity generates strength.

Consonant with ideals of free speech, the common law thrives on opposing voices, demanding that dissenting judicial opinions be printed with the majority's opinion. Common law holds that where conflicting opinions enjoy freedom of expression, truth will overcome falsehood. This principle is seen not only in the common law's insistence appellate courts publish minority opinions, but also in the common-law right of the accused to full freedom of defense—though in recent decades this principle has eroded. Because punishment for differing, or even erroneous, opinions chills freedom of expression of valuable ideas, the common law bars any government penalty for opinion. "My Lords," argued William Murray, "there never was a single instance, from the Saxon times down to our time, in which a man was ever punished for

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group of men, as is done in the civil-law state. *See Isaiah* 33:22 (distinguishing these three offices and providing a biblical understanding of חקק, *khaqaq*: that which is scratched in metal or stone for permanence, meaning *lawgiver*). *James* 4:12 expresses the Old Testament concept of *khaqaq* ("lawgiver") with *νομοθετης* (*nomothetays*): literally, the law establisher who issues a final decree from which there is no appeal—that which is fixed and, for purposes of the writer's example or point, unchangeable, as though scratched in stone or metal.

One can distinguish the legislative and judicial offices of government, says Cooley, by the *tense* to which their authority pertains. The legislature declares what the law *shall be*; the judicial power articulates what the law *was* in any given past circumstances; the executive enforces the law *in the present*. *See* Dash v. Van Kleek, 7 Johns 498, per Thompson, J., *quoted in* COOLEY, *supra* note 61, at 94–95. Thus, common-law courts ought to decide cases according to the precedent available at the time of the events in issue, not according to precedent as it stands at time of trial.

erroneous opinions . . . but upon some positive law. The common law of England knows of no persecution for mere opinions."[1506]

In Rome's empire, trial by a jury, exercising final authority and power over individual cases, was unknown. To the Romans, a jury of neighbors or acquaintances was unnecessary because at any tribunal all that mattered was the will of the state. Since the Roman state knew its will better than any other; and since the state was incarnate in the person of the emperor; and since the emperor was at every Roman tribunal in the person of his provincial viceroy, the state enforced its will; no Jury was allowed to object. Such inquisitorial attitudes yielded their full force under Diocletian, who often tortured witnesses, especially slaves, to get desired testimony.[1507]

In his *Commentaries*, William Blackstone describes the rack as a tool of civil law, calling it an engine of state, not law. He refers especially to the torture rack in the Tower of London—called the "Duke of Exeter's daughter"[1508]—to remind his readers of civil law's monstrous methods:

> The rack . . . [used] to extort confession from criminals, is a practice of a different nature . . . [T]rial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk . . . had laid a design *to introduce the civil law into this kingdom as the rule of government for a beginning thereof they erected a rack for torture*; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London: where it was occasionally used as an engine of state, not of law, more than once in the reign of Queen Elizabeth.[1509]

[1506] Argument of William Murray before the House of Lords *in* Chamberlain of London v. Allen Evans, *quoted in* HEWARD, *supra* note 386, at 151.

[1507] The Spanish Inquisition is a well-known example of inquisitorial torture under civil law's systematic methods. Such was the role of Pontius Pilate as governor of Judea at the inquisition of Jesus Christ: Pilate was inquisitor. Trial by the Jury with power of final determination of fact and application of law remains unknown in civil-law states. Even in England and British Commonwealth countries, legislators increasingly confine trial by jury to trials for felonies. By establishing the Star Chamber Court, civil-law-minded clerics infected England with inquisitorial devices; use of the Star Chamber by Roman-leaning English monarchs still haunts the memories of liberty-loving people. In 1641, invoking the common law, England abolished the Star Chamber Court.

[1508] The Duke of Exeter, minister to Henry IV., introduced the rack into England. Thus, Englishmen named his engine of torture, *the Duke of Exeter's daughter*.

[1509] 4 WILLIAM BLACKSTONE, COMMENTARIES *320–21 (emphasis added). Blackstone tells apart true law and the state, implying that the use of the rack, as an inquisitional engine of civil law, arises from state power and not from the authority of the law. Torture is a creature of state usurpation of power, i.e., unsupported by authority. God has never

Contrary to Scripture and the common-law tradition, guilt by confession[1510] is central to civil law's inquisition; thus, the confessional is its key tool. Inquisition—whether induced by the harassing infliction of guilt's humiliation and discomfort upon the soul through the confessional booth, or wrung out of the conscience by depravation of emotional or bodily needs and infliction of physical discomfort by torture or by threat of torture—seeks confession, deeming it enough to establish guilt. By contrast, in place of coerced confession, both Scripture and the common-law tradition uphold the right to remain silent; as a rule, confession alone is never enough for conviction.

The inquisitorial notions of the civil law stand in stark contrast to the common-law ideals placing the judge under a duty to function as a neutral officer, much as an umpire. The common law also adds the Jury, whose determinations of fact as well as application of the law form a buffer between the judge and the accused.[1511] The civil-law judge, on the other hand, is a civil servant, whose ultimate loyalty is as the ancient Roman governors: to the state. Once the Roman emperor's governor had crossed the pavement, ascended the steps to the seat of judgment, and sat in it, his words were *ex cathedra*; calculated to achieve the interest of

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authorized torture as a tool of government. See generally § 5.1.10 of this book (discussing inquisitional torture).

[1510] God's Word forbids the finding of forensic guilt by confession alone. See generally §§ 5.1.10–5.1.10.1, 4.7 of this book (discussing the confessional and the unlawful use confession evidence as the sole establisher of guilt). Under American constitutional law, confession per se is often inadmissible as are confessions deemed involuntary because coerced. Courts have found that confessions resulting from circumstances such as threats or suggestions of violence, depravation of food, medication or sleep, separation from family, friends, or legal counsel are unconstitutional.

[1511] Among other reasons, the Jury are necessary in the event that the judge is less than neutral, i.e., biased. In common-law trials, bias is always relevant. By recognizing the relevance of bias, the common law recognizes the unworthiness of man as a final standard of law and justice.

Bias is a preformed inclination in one's character that causes diversion from that which is true, despite the fact or even force: to force a man against his will leaves him of the same opinion still. As a term of physics, *bias* denotes the effect of an inner weight, offset from center in a perfectly spherical ball, such as a billiard cue ball. Regardless of a true strike of the cue, because the inner offset weight has destroyed the cue ball's balance, it cannot follow a straight line on a perfectly flat table, but will always veer from a true course, according to its *bias*.

In display of the importance of bias in detecting truth, consider the debate between the Darwinian evolutionists and the proponents of intelligent design. Both camps have the same set of facts from which to draw reasonable conclusions; adherents in both camps are capable of so doing. Yet, from this common set of facts, these two camps draw contrary conclusions. The inner imbalance of bias is the feature bringing this difference. In the courts, where experts disagree, litigants must probe their bias to separate truth from error.

the Roman state as personified in the emperor.[1512] The state protected private relationships only if considered in the state's best interest to do so; moreover, the governor's position was secure only as he remained in the favor of the emperor.

Common law assumes that men and women are, by nature, able, and therefore, individually responsible to discern three things: the kinds of their relationships with others, the responsibilities those relationships entail, and how to respond in accord with those standards of responsibility. Common-law courts wrestle with specific problems after they arise, have ripened into real wrongs done, and are sharpened by adversity joined in conflict: the common-law tradition looks to the courts to discern and articulate law in retrospect of, and specifically tailored to, real wrongs done. Where parties disagree on these matters and their disagreement is one over which the law has given a court jurisdiction, the court will accept evidence from the parties and will oversee the discovery, articulation, and application of fitting standards.

A crucial aspect of the common law's adversarial tradition is its system of checks and balances: checks put the power of another party in real risk; balances make that risk mutual. The common-law tradition uses more checks and balances to restrain government than its separation of powers or the Constitution can list. Common-law government and the freedom it yields depends upon these checks and balances, not only between the separate branches of government,[1513] but also among and between judges, competing lawyers, legislators, executives, clerics, administrators, churches, theologians, and voters operating within a dynamic forged out of persistent adversity, welling up by nature from independence of judgment, not from any revolutionary spirit. Competition according to fair play is the life of the common law. This dynamic is only explainable through an acceptance of Providence in

[1512] By the Roman governor sitting on the seat of judgment, he provided the Roman formality necessary for his judgment to have legal effect—or so the Romans liked to believe. See generally F.F BRUCE, THE ACTS OF THE APOSTLES: THE GREEK TEXT WITH INTRODUCTION AND COMMENTARY (1953), *commenting on Acts* 25:6, 10.

[1513] The common-law principle of *checks and balances* is most often understood as it applies to the separate powers of government: the power of each of the three co-equal branches of government too counter the actions of either or both of the other two branches, thus baring any single branch from controlling the entire government, i.e., the other two branches. *See* U.S. CONST. art. I, § 7. For example, the executive branch (the president), by exercising its veto power, checks the legislative branch (Congress); the legislative branch, by a two-thirds majority, can override that veto. *See id. See also* BLACK'S LAW DICTIONARY 231 (7th ed. 1999). The common law has so fashioned our government that no one man, or any other single will can make it work.

history, from which has emerged the ideal that every individual's Godward responsibility is personal and direct to discern, determine, and apply law as God informs and enlightens his conscience through nature and by Scripture.

§ 5.1.5.1
Real Case & Controversy

The common law is the law of the practitioner rather than the philosopher.[1514]

"No one knows what the common law is . . . ," said Robert Rantoul, "it does not even exist in the breast of the judge."[1515] Rantoul has well spoken in that the common law is yet nonexistent in the judge's breast or mind until he or the Jury makes the right finding in a particular case.

A common-law court's jurisdiction is never over ethereal, abstract, or hypothetical questions; rather, common-law courts have jurisdiction over *real cases and controversies only* and articulate opinions reasoned only in retrospect of past wrongs done. Real cases and controversies concern allegations that a court recognizes to be real due to actual disagreement between parties concerning foremost fact and law, or both, neither staged nor fabricated. Speculative pronouncements of academicians, philosophers, and legislators speak to fortuitous events and, therefore, are unreliable evidences of the common law.

Common-law courts, therefore, hold jurisdiction only over matters brought to their attention by a plaintiff's cry of genuine injury: the initiator of a legal action must be a *bloody plaintiff*, as opposed to a litigant anticipating injury.[1516] A real controversy, says Chief Justice Hughes, is not merely "hypothetical . . . academic or moot . . . [but rather is] definite and concrete . . . real and substantial. [It is] distinguished

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[1514] Harlan Fisk Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4,6 (1936).

[1515] Robert R. Rantoul Jr., *Oration at Scituate, Delivered on the Fourth of July, 1836*, *in* LAW AND JURISPRUDENCE IN AMERICAN HISTORY 255 (Steven B. Presser & Jamil S. Zainaldin eds. 1989).

[1516] *See* U.S. CONST. art. III, § 2. Legal action in anticipation of something that might happen does not give a common-law court jurisdiction: common-law courts are not courts of speculation. In the common-law tradition, however, equity can grant jurisdiction over a person in anticipation of what could happen, i.e., if the petitioner shows by clear and convincing evidence that irreversible harm to himself is more likely than not. The common law calls such court jurisdiction *extraordinary* and intends it to provide only temporary relief. A common-law court, however, ought never enjoin or forbid the exercise of a fundamental right due to a complainant's fear of possible harm.

from an opinion advising what the law *would* be upon a hypothetical state of facts."[1517]

Under certain extraordinary circumstances, common-law courts have applied a principle *called* hypothetical jurisdiction. The name, however, is a misnomer because the jurisdiction this principle claims is hardly hypothetical. It is available where one criminally accused appeals from a trial court verdict by citing error or misconduct of a government prosecutor followed by the prosecutor's attempt to change his position, agree with the defendant, and confess his error or misconduct in order to avoid sure humiliation and defeat in the appellate court. The prosecutor, by so doing, hopes to preempt any legal dispute with the accused, thereby removing any question for the appellate court to decide. In a word, the government, by feigning agreement with the defendant an confessing its error, removes the appellate court's jurisdiction under the Constitution's Real-Case-and-Controversy Clause.

In the case cited below, the appellate court claimed hypothetical jurisdiction, so-called, because of prosecutorial misconduct and, arguably, the trial court's ignoring of fundamental rights of accused persons, spanning previous years. The government, by confessing its error, sought to keep the case from going up on appeal and thereby risk an appellate court finding against the government on the record and in favor of future defendants' Fifth Amendment rights. The Ninth Federal Circuit Court of Appeals, however, discerned the government's scheme.

Though later overturned citing offence to separation-of-powers, the appellate Court relied on another common-law first principle: law forbids one to achieve that which is unlawful by otherwise lawful means. Even though the appellate court called their jurisdiction *hypothetical*, it observed that the real dispute was over the most fundamental of issues: jurisdiction—definite, concrete, real, and substantial:

> The parties disagree as to whether we have jurisdiction to hear this appeal. *Indeed, the complex problem of jurisdiction presents the sole substantial disagreement between Troescher and the government.* Accordingly, we conclude that this case is appropriate for application of the doctrine of hypothetical jurisdiction. See Wong v. Ilchert, 998 F.2d 661, 662 (9th Cir. 1993) (assuming without deciding the existence of subject matter jurisdiction where

[1517] Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227, 240–41; 57 S. Ct. 461, 464 (1937) (emphasis added).

> the "difficulty of resolving [the jurisdictional question] is far greater than the difficulty of resolving [the merits of the appeal].").[1518]

The common law's real-case-and-controversy requirement reduces litigation by siphoning off those litigants hoping to use the courts for political activism and social engineering; it tends to bar from courts the less-serious litigants, limiting use of the courts to those seeking redress of genuine grievances. The doctrine discourages the litigant from clogging the courts with every petty complaint, while encouraging settlement of differences privately and consonant with the words of Christ to "befriend your legal opponent *quickly*."[1519]

Civil law seeks to confine its consideration of justice to the abstract potential of the human mind. By contrast, the common-law tradition trusts nothing to the mind of man in exclusion to other aspects of his being. By limiting the jurisdiction of the courts to real cases and controversies, where life, liberty, or property are at stake in deed, the common law counts on adversarial engagement of every aspect of each litigant's being—mind, will, emotions, heart, strength, conscience, compassion, and conviction—to sharpen issues and uncover truth in fact and law.

§ 5.1.5.2
Process Focus –*vs*– Result Focus

The central idea in the developed Roman system is to secure and effectuate the will. All things are deduced from or deferred to the will of the actor . . . Arising as the law of the city of Rome . . . it held them for what they willed . . . In our law [common law], by contrast, the central idea is rather relation . . . The Romanist speaks of family law. We speak of the law of domestic relations. The double titles of our digests, such as principal and surety, or vendor and purchaser, where the Romanist would use one word, suretyship or sale, tell the same story. Anglo American law is pervaded on every hand by the idea of relation.[1520]

[1518] United States v. Troescher, 99 F.3d 933, n.1 (1996) (emphasis added).

[1519] *Matthew* 5:25 (emphasis added). *ταχυ* (*tacku*): adverb, as soon as possible, without hesitation. A papyri from A.D. 16, putting the term in the comparative, gives the sense of the term: *ερωτω σε ταχυτερον συσχειν τ[ο]πραγμα* (I beg you to close the matter with all speed). JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 627 (1930).

[1520] ROSCOE POUND, SPIRIT OF THE COMMON LAW 21–22 (1921). Common lawyers seek first to master the facts of a case in order to discern the relationship from which the

The common-law tradition is process intensive; the civil-law tradition is result intensive. The common-law ideal entails tenacious observance of due process, which allows exposure of the facts of the case, bringing understanding of the applicable standard of law and its right application, i.e., justice. By contrast, the civil-law ideal demands tenacious insistence upon the legislator's will, which it calls justice. Here the common lawsharply distinguishes itself from the civil law. Common law seeks to order private relationships aright and thereby strengthen them; civil law seeks to enforce the will of the dominant actor, of which the most dominant is the state.

The doctrine of due process,[1521] therefore, distinguishes the common law from the civil law. This distinction does not mean, however, that civil law is without its traditional processes and procedures. In contrast with civil law, however, common law always attributes as much importance to its procedural due process as it does to its substance, and at times, even more.[1522] The civil-law tradition deemphasizes procedure as a means of

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applicable law emerges. Civil lawyers, on the other hand, seek to master the provisions of the Code in order to enforce the will of the powerful party, which civil law calls *the dominant actor*. At common law, rights and duties (the law) emerge from relationships and circumstances, facts that litigants discover through due process. By contrast, civil law decrees a fiction: all know the law by the statutory commands of the state. Common law, therefore, is fact intensive and civil law is code intensive. Because the facts control in common-law countries, to give a right result, all concerned must focus on uncovering and respecting the facts. The parties, therefore, try the disputed facts in the fires of litigation. By contrast, the Code controls in civil-law states because the state considers it pure, the scholar-legislator claiming to have tested it by logic. The civil lawyer, by training and tradition, trusts scholar-legislator and thus foregoes any further methods of testing his conclusions. The common law, however, holds that the testing of conclusions, to be reliable, must not only be by reason, but also, according to Scripture and the senses.

[1521] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1522] Common-law due process is the soul and heart beat of the common-law tradition; it is said to be substantive in that the process owing must be genuine and never a matter of mere form. "Due process requires that a hearing 'must be a real one, not a shame or a pretense.'" Joint Anti-Fascists Refugee Committee v. McGrath, 341 U.S. 123, 164 (1951), *quoting* Palko v. Connecticut, 302 U.S. 319, 327 (1937). Benito Mussolini's famous order to his administration in two steps illustrates the lack of genuineness in a hearing, i.e., having right form without substance: "Have these men properly tried and then shot."

The Anglo-Saxons' emphasis on due process even disallowed default judgment for the opposing party's failure to appear in court. By contrast, anciently, civil law has observed the doctrine called *first decree*. Known in civil law by its canon-law title *primum decretum*, the doctrine grants a default judgment in the plaintiff's favor on the nonappearance of the defendant at the first hearing on the case.

vindicating personal rights and liberties. Common-law countries seek government by law and not by men. In order, therefore, to reveal truth and enable justice, litigants must demand the process due to them and never rest their hope in the magnanimity of judges or other magistrates. A litigant cannot control the outcome of his case, but he can insist that the court observe the procedural rules of engagement: timely notice and a meaningful opportunity to be heard, a fair and impartial judge, a neutral prosecutor in criminal cases, even-handed holding to the laws of evidence, and fundamental fair play. The common law is process focused because it is fact intensive; the civil law is result focused because it is code intensive.

At common law, the means makes lawful the end and not *vice versa*. If the forms are lacking (the court ignores pre-established procedure that is due and owing to the parties) or substance is lacking (the court ignores duties and responsibilities the law requires), then the end (judgment) is void. Not only does common-law due process require ample and timely notice to opposing parties and a genuine opportunity to present one's side of the case, it also provides more than a single opportunity in the right of appeal. Opportunities for appeal multiply occasion to test all things against first principles, allowing parties and courts to uncover and recognize underhanded dealings, bias, ignorance, and misunderstanding: the weaknesses of humanity, ever present in every case. The procedure owing (due process) means ample opportunity. Used wisely, the processes of the common law will uncover a multitude of truth that otherwise will remain suppressed.

Practiced in its unadulterated forms, common law seeks to discover—not create—the law and its application. The civil law, on the other hand, takes the human will and mind as expressed with legislation[1523]—whether from one man, a body of men, or an administrative bureaucracy—as the source from which law springs. In the civil-law tradition, where available legislation fails to address the facts and circumstances before the tribunal, the civil lawyer applies the Code by scholastic extrapolation, reasoning from particulars instead of from first principles. The common-law, by contrast, reasons from the applicable first principle, running

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The present common-law rule grants default judgment for a party's nonappearance at first hearing only if the plaintiff proves to the court that he has provided, by his complaint, timely notice to the defendant of the pending hearing.

[1523] See generally § 4.3.3 of this book (discussing the characteristics inherent in the office of legislator that render legislative power dangerous if never subject to judicial review by jurors and judges).

through kindred case opinions, to the particular facts of the case at hand. Therefore, the common law and civil law rest on disparate ideals.

Though seldom able to keep neat separation of the steps, the common lawyer seeks the right application of the law by a six-step process. *First*, he masters the facts of the case at hand. *Second*, he discerns the relationship between the parties. *Third*, he compares the facts to previous cases, distinguishing for guidance those cases most on point. *Fourth*, he finds the applicable principle threading through the case opinions. *Fifth*, using that principle for the major premise and the facts of his case as the minor premise, he draws his conclusion. *Sixth*, he tests his conclusion against all other relevant precedents, facts, and circumstances.

The civil lawyer, on the other hand, begins with the Code, taking its language for his major premise, the facts of the case then before the tribunal for the minor premise, and draws his conclusion. Put another way, the common lawyer enters a quest to discover the right measuring stick with which to gauge the unique case before the court; the civil lawyer trusts that the state, by the wisdom of academia, has provided the fitting standard by its legislation: the civil-law Code.

Common law repairs to precedent as the concrete empirical evidence of the law and its right application, in view of the relationship of the parties before the court. Civil law repairs to the civil code as the decreed will of the state. The controlling aspect of the common law is the facts of the case before the court; the controlling center of the civil law, says W.A.J. Watson, is the legislative decree:

> In civil law countries the study of the *Corpus Juris Civilis* has influenced habits of legal thought and techniques, including attitudes to legal rules, legal classifications, courts, and precedent . . . The emphasis in Justinian's Institutes was on authoritative explication of the law . . . Precedent . . . —as in common law—could have no place . . . in a civil law system. Even in those modern civil-law systems that recognize a legal force in precedent, much less interest is accorded to the detailed facts of the case than in the common law . . . the decision must be based . . . on rules or principles embodied in a code.

Facts drive the common-law tradition, enabling discovery of the fitting standard of law; legislation drives the civil-law tradition, enabling ready obedience to the will of the state.

Being process focused instead of result focused, common law has recognized that justice stands the best opportunity where the court affords the procedure due to each of the parties (due process). Due process is the common law's recognition that plaintiffs and prosecutors sometimes bring groundless or vindictive complaints and charges. Law requires judges and jurors to be objective. If a judge appears bias or has a conflict of interest, due process requires that the judge recuse himself; jurors must maintain the presumption of innocence toward the accused until all process due and owing is complete.[1524] In spite of good intentions of those administering law and government, injustices occur; due process provides opportunity for correction. Though due process eludes definition until applied in a specific instance, at a minimum, it demands fair play: the indispensable ingredient to the genuine operation of the adversarial tradition.

The real difference, then, between the common law and civil law is not that the two traditions always recognize different sets of substantive laws: if, for example, a common-law country and a civil country both adopted the same civil and criminal codes, the two traditions, in their approaches to judicial proceedings, will remain as distinct as night and day. The controlling difference, is in the mindset, mental method, and practical processes—or lack thereof—of those administering and participating in these distinct traditions: the goal and focus of the common law is due process; the goal and focus of the civil law is to enforce the will of the state.[1525]

The purpose of the courts is discovery of truth; God's method provides the best opportunity for truth's discovery. Common-law due process translates into fair play and insures a difference in the product:

> The fact of the matter is that there exists all around us a great body of law, which has not ever been (nor could it be) written down in one spot. *In a way, its more of a process* which has a single guiding rule, the "golden rule," a negative

[1524] Concerning the *duration* of the presumption of innocence, due process requires that the judge and each juror maintain the presumption of innocence throughout the entire pretrial proceedings and the entire trial and deliberation of the Jury against the accused. The accused remains forensically innocent until the Jury foreman signs the verdict.

[1525] See generally § 5.1.5 of this book (discussing the adversarial character of the common law, vital to common-law due process).

> rule, "Don't do something to someone that you don't want to have visited on yourself, either directly or through the agency of a government." Though it has suffered much at the hands of legislators, common law is yet followed in all major English-speaking nations around the world.[1526]

Tailored Rules of Law –vs– Precise Statutes

Due to appellate precedent, the common law brings harmonious application of first principles to evermore-acute circumstances. For example, American courts conform their findings respecting due process and the Bill of Rights to those set by the United States Supreme Court. As these findings develop, courts nationwide apply constitutional limitations on government with a measure of consistency.

Because the common law's method recognizes and responds in retrospect to the special facts of each relationship and case, it produces narrowly applicable rules of law in response to peculiar sets of facts, discouraging any one-size-fits-all standard. Common law tailors the application of the law to the facts of the case before the court; civil law tends to force the facts of a case into the statute. Applying the law to the facts, however, shows respect for the individual's particular station and circumstances. Common law loathes abstract theory unproven on the anvil of litigation and unshapen under the strokes of adversity.

Common law's methods produce narrowly tailored rules of law. Thus, new applications of old principles develop slow but reliable as courts progress with caution, testing each step—as does a man picking his way through a minefield. Courts restrain legislatures from running ahead of their country in academic speculation and allow time for individuals to ponder and criticize court opinions, and adjust their affairs accordingly.[1527] Judges facing real conflicts in litigation articulate

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[1526] WALTER BAGEOT, THE ENGLISH CONSTITUTION 229–30 (n.p. 1867), *quoted in* Peter Landry, *The Common Law: Tradition & Stare Decisis* (visited 21 *Nov.* 2005) <www.blupete.com> (emphasis added). Bageot recites the common-law rule as King Alfred has written it; though it resembles the Golden Rule, it is not. This common-law rule is a passive rule of justice; the Golden Rule is an active standard of grace. To hold to either is right-headed: the passive rule of justice lays down the permissible floor of human behavior below which the courts must never allow the individual to sink without penalty; the active principle of grace sets up the standard to which the individual aspires in pursuit of excellence. See generally § 4.3.2.4 of this book (discussing King Alfred's inclusion of the negative rule of justice in his *Laws of King Alfred* and the distinction between justice and grace).

[1527] Living by faith means that, moment-by-moment, the individual trusts God's Spirit for the illumination of His Word to teach him the right application of its principles.

common-law rules. Common-law courts write their opinions in a literary form digestible by the general populous, thus opening themselves to ready criticism and enabling informed court adjustment.[1528] In contrast, in civil-law countries, university theorists and academicians construct narrow and detailed legislation according to abstract theories.

Recognizing the foregoing qualities of common-law due process and methods enable their conscious reinforcement and perpetuation; their ongoing vindication will maintain the principles of due process as our defensive mechanism against the materialistic realism and positivism inherent in civil-law doctrines. Throughout her history, America has maintained the common-law approach to legal conflicts described above. The common-law has shown its ability to dominate and bring under its influence notions disagreeable with its first principles. As the Mississippi River's yearly flooding over its bottoms overlays the sand with topsoil, increasing productivity, the common law overlays false applications of law with good precedent.[1529]

§ 5.1.5.3
Due Process:
The Law of the Land

In Coke's writings on chapter 29 of Magna Carta was a rudimentary concept of substantive restrictions, which never developed in England because of parliamentary supremacy, but which was to flower in the United States.[1530]

Due process requires that the court accord to each one having an interest in a case fair opportunity to lay his evidence in the balance and argue for

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[1528] See generally BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), for an overview of the methods of common-law courts. For centuries, civil lawyers have theorized—in futility—that the state, by publishing a single civil-law Code that is all embracing *and* understandable to the people, will eliminate any need for lawyers. This theory, a strong component of the civil-law tradition, has proven impossible to reach. Because the common lawyer's duty to exercise independent judgment threatens state power, statists have scorned common lawyers. Despite inevitable breeches of ethics and failures of courage, common lawyers at times still rise to their duty and check state power, sometimes at great personal sacrifice.

[1529] For both the yearly flooding and the Holy Spirit's movement, no other option is available but to depend upon God. Jesus Christ likens the activities of the Holy Spirit to the wind: "The wind blows where it *wills* . . . ." Scripture uses θελω (*thel-ow*: will) to stress the private determination of God the Holy Spirit to do His pleasure: viz., His will. At times, the Holy Spirit is pleased to enlighten our common-law tradition through His providence of circumstances and the influence of the individual.

[1530] *Derived from* <www.findlaw.com>: U.S. Constitution, Fifth Amendment: Annotations at 11 (visited 26 Nov. 2007).

the weight to be given it. The purpose of the law is to get at the truth; the common law believes that following due process gives the best opportunity. Providence has inextricably woven due process in the fabric of the common-law tradition; due process is the common law's being. Though due process defies definition, to those accustomed to its worth it thrives to reapply its old principles in the ever-running stream of new circumstances. The human mind, however, in unceasing subtlety, crafts modern devices to violate ancient rights of due process. "Due process is violated," states the Supreme Court, "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[1531] Constitutional due process embraces first principles:

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just.[1532]

The written ideals of due process are "a historical product"[1533] that harks back to Magna Carta chapter thirty-nine—further back as unwritten custom. "No free man," King John conceded, "shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[1534] In the Third Reissue of Henry III. (1225), Magna Carta chapter 39 became chapter 29[1535] with expanded language:

> No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land.

[1531] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[1532] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting).

[1533] Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[1534] *See generally* W. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375–95 (Glasgow, 2d rev. ed. 1914) (providing text and commentary of Magna Carta ch. 39).

[1535] *See id.* at 504. *See also* 139–59. *See also* J. HOLT, MAGNA CARTA 226–29 (1965).

The 1225 reissue also added to clause twenty-nine, the original text of clause forty, "To no one will we sell, to no one will we deny or delay right or justice." The 1225 reissue remains the standard text.

In 1354, the phrase *due process of law* first appeared in a statutory rendition of clause twenty-nine: "[N]o man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[1536] Thus, within 129 years, the earlier restrictive phrase "free man" had given way to the all-embracing phrase "no man."[1537] Though Magna Carta emerged out of the struggle between King John and England's barons,[1538] over time its Due-Process Clause transcended its former limitation of scope; throughout the fourteenth-century, parliamentary interpretation enlarged the application of due process to commoners.[1539]

The Framers the United States Constitution's Fifth Amendment Due-Process Clause received their understanding from Coke. In his Second Institutes, Coke proposed that the term *by law of the land* was equivalent to "due process of law," which he in turn, defined as, "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by writ original of the Common Law."[1540] Coke then expounded his proposition.

To Coke, the significance of both *due process* and *law of the land* was procedural, but Coke's commentary on Magna Carta chapter 29 included rudimentary concepts of substantive restrictions. The phrase "law of the land" was early the preferred expression in English colonial charters and declarations of rights in North America, which gave way to the phrase "due process of law," although some State constitutions continued to use both phrases. Regardless of which of the two phrases a state used, the concept remained the same: closely adhered to processes meant to

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[1536] 28 Edw. III., c. 3. *See generally* F. THOMPSON, MAGNA CARTA—ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629, 86–97 (1948) (recounting statutory confirmations of Magna Carta).

[1537] Later, the Founders used the phrase *all men*. THE DECLARATION OF INDEPENDENCE para. 2 (1776). Nowadays, American legislation uses the all-embracing expression *any person*. *See*, *e.g.*, 42 U.S.C. § 1983.

[1538] *See* W. MCKECHNIE, MAGNA CARTA—A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (Glasgow, 2d rev. ed. 1914). *See also* J. HOLT, MAGNA CARTA (1965).

[1539] *See* F. THOMPSON, MAGNA CARTA—ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629 (1948).

[1540] SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, pt. II, 50–51 (London 1641). *See generally* A. HOWARD, THE ROAD FROM RUNNYMEDE—MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968) (reviewing of the influence of Magna Carta and Coke on the American Colonies and the new nation of the United States).

safeguard the life, liberty, and property of the defendant. The concept also suggests some limitations on substance because of its association with the common-law guarantee of just compensation upon the taking of one's private property for public use. The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the phrase "law of the land" in a separate article,[1541] whereas Virginia used the clause in a section of guarantees of procedural rights in criminal cases.[1542] New York, in its Constitution of 1821, was the first State to pick up the phrase "due process of law" from the United States Constitution.[1543]

Standing alone, the phrase "due process" appears to denote only procedure and process in court—an already-settled matter of form to be followed in every case. Due process of law, however, embraces not only what the courts do but also the legislative and executive branches. Though the legislature can enforce common-law ideals of due process, in the common-law tradition, due process is never limited to what legislative branch enacts it to be, so also is the meaning of constitutional due process:

> It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law" by its mere will.[1544]

In general, according to the Supreme Court, raw territoriality limits the application of American constitutional due process. For example, all persons within the territorial boundaries of the several United States are entitled to the protections of due process, including corporations,[1545] aliens,[1546] and, presumptively, citizens seeking readmission to the United

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[1541] *See* 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, H. Doc. No. 357, 59th Congress, 2d Sess. 1688 (1909).

[1542] *See* 7 *id.* at 3813.

[1543] *See* 5 *id.* at 2648.

[1544] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). Daniel Webster had made a like argument before the Supreme Court in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 82 (1819). *See also* Chief Justice Shaw's opinion *in* Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857).

[1545] *See* Sinking Fund Cases, 99 U.S. 700, 719 (1879).

[1546] *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896).

States,[1547] but States of the Union are never so entitled.[1548] Constitutional due process is effective in the District of Columbia[1549] and territories belonging to the United States,[1550] but according to the Court, is inapplicable of its own force to unincorporated territories.[1551] Constitutional due process, the Supreme Court has held, does not reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[1552]

At bottom, due process embraces two areas: *first*, the procedure the common law demands because proven—through good sense and by long experience—most likely to uncover truth; *second*, the rules of practice in proceedings before, during, and after trial, including the rules governing the admission of evidence and the testing of the credibility of witnesses.

§ 5.1.5.4 Cross-Examination: Engine of Truth

[I]t is not some effective point that is the true test of a great cross-examination, but the general effect that is produced upon a jury, by a review of all the witness has said, bringing out inconsistencies, contradictions, improbable situations which result finally in the breakdown of the witness's story . . . Really great triumphs in the art of cross-examination are but seldom achieved . . . yet few pleasures exceed that afforded by its successful application in the detection of fraud or the vindication of innocence.[1553]

Beginning with the Norman invasion of 1066 and until 1688, English courts refused to those accused of treason and felonies the right to legal counsel. After Parliament deposed James II., however, the courts recognized not only the right of the accused to counsel for his defense, but also his right to examine witnesses, but still barred the accused from addressing the Jury. To compensate, counsel for the defense began using

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[1547] *See* United States v. Ju Toy, 198 U.S. 253 (1905); cf. Quon Quon Poy v. Johnson, 273 U.S. 352 (1927).

[1548] *See* South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

[1549] *See* Wight v. Davidson, 181 U.S. 371 (1901).

[1550] *See* Lovato v. New Mexico, 242 U.S. 199, 201 (1916).

[1551] *See* Public Utility Comm'rs v. Ynchausti & Co., 251 U.S. 401, 406 (1920).

[1552] *See* Johnson v. Eisentrager, 339 U.S. 763 (1950). See also In re Yamashita, 327 U.S. 1 (1946), wherein Justices Rutledge and Murphy argue that the Due-Process Clause applies to every human being, including enemy belligerents.

[1553] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 302–03 (New York, Dorset Press 1986) (1903).

leading questions, to stretch the defendant's right to re-examine witnesses before the Jury into the right to cross-examine:

> And so, debarred of one means of advocacy, they sought another, and, said Sir James Steven, ". . . their cross-examination therefore tended to become a speech in the form of questions, and it has ever since retained this character to a greater or lesser extent."[1554]

Cross-examination is a creature of the common law: the child of the common law's adversarial personality grown to strength and, under skilled command, the fearsome foe of falsehood and fast friend of truth. "[B]eyond any doubt," says Wigmore, "the greatest legal engine ever invented for the discovery of truth is cross-examination."[1555] In cross-examination, the witness box becomes a crucible for refining the silver of truth by allowing the rising and drawing off of the dross of falsehood. Due to its potential to purify a testimony, says Cox, "[c]ross-examination . . . has always been deemed the surest test of truth and a better security than the oath." The oath, with its solemnity, is a reminder meant to awaken the conscience in one having moral scruples, inciting his desire to let loose of the truth; cross-examination, with its power to draw, exposes it for the Jury.

Further, cross-examination tests not only the one upon whom the oath has taken effect, but also the rascal upon whom the oath takes no effect. The rascal, being without active conscience, has no intent to tell the truth; the sincere witness, even though having the intent to be truthful, is often hampered with faulty perception or memory, misunderstanding, bias, or the obscuring effects of time. In sum, human weakness erodes testimony, most of which falls short of the whole truth.[1556] The common-law acknowledges such human weaknesses in both honest and dishonest witnesses by recognizing that cross-examination is indispensable to the discovery of truth—that ever-elusive fugitive. Thus, the Sixth Amendment to the Constitution guarantees the right of the accused in a criminal case to confront witnesses through cross-examination.

[1554] STRYKER, *supra* note 48, at 72.

[1555] Wigmore was the master of the common law of evidence. See generally FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION (New York, Dorset Press 1986) (1903), for examples and discussion the art of cross-examination for non-lawyer and lawyer alike.

[1556] Paul the apostle testifies to the struggle inherent even in those delighting in the truth, to speak and act in harmony with the truth. *See Romans* 7:14–25.

Cross-examination is the questioning of a witness at trial or hearing by the party opposed to the party who called the witness to testify, or by the party who has called a witness to testify that is hostile to him.[1557] The purpose of cross-examination is to get at the truth by, for example, separating truth from falsity, discrediting a witness's testimony before the Jury, the judge, or both. Cross-examination tests the witness's perception of facts through sight, hearing, taste, touch, or smell. It seeks to uncover contradictions and improbabilities of an earlier testimony of the witness or to trap the witness into admissions that weaken his testimony. The common law allows the cross-examiner to ask leading questions: questions that suggests, and even provide, the answer, most often leaving nothing for the witness to answer except *yes*, *no*, or *I do not know*.

The traditional rules of cross-examination limit its scope to questions concerning matters covered on direct examination. By way of contrast, the direct examiner's questions must never assume any facts: he must base his questions upon the witness's previous answers. The cross-examiner's questions, on the other hand, assume as much as he dares. By forming leading questions, the cross-examiner's questions become statements: his interrogatives are also his indicatives, i.e., statements that are, in the cross-examiner's view, true.

At bottom, the success of cross-examination rests on the knack to see the weakness in any testimony and to expose it before the Jury with good effect. The art of cross-examination, says Wigmore, requires twelve essentials: (1) mastery of the subject and facts of the case,[1558] (2) ingenuity, (3) habit of logical thought, (4) clear perception, (5) patience, (6) self-control, (7) utmost caution, (8) the ability to grasp the mind of the witness, (9) the insight to discern character from the witness's face, (10) the sensitivity to appreciate the witness's motives, (11) the instinct to discover the weak point in the witness, and (12) the courage to act with precise force at the opportune moment.[1559]

The effectiveness of the cross-examiner must begin with mastery of the subject and facts of the case. Such preparation brings the confidence necessary to bolster the courage required to act at the opportune moment—contrary to pressure from a tyrannical judge or the resistance of a determined witness—to breach, with precise and focused force, the

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[1557] *See* BLACK'S LAW DICTIONARY 383 (7th ed. 1999).

[1558] Because a common-law trial is combat over disagreement of the facts of the case, of all requirements, mastery of the facts is the most important.

[1559] STRYKER, *supra* note 48, at 73–74.

point of weakness in the witness's testimony. In so doing, however, the cross-examiner must control the force of his breach, taking care to never to punch through any farther than his purpose. "When you strike 'iyle," said Josh Billings, "stop boring; many a man has bored clean through and let the 'iyle run out of the bottom."[1560]

The soul of the common law is in its *practice*; the heart of its practice is the Jury trial; the heartbeat of Jury trial is cross-examination. Thus, the right to confront witnesses with cross-examination—as all matters of fundamental due process—is best understood in its doing. Consider the following example from a criminal case in the Federal District Court, charging three defendants[1561] with conspiracy: more precise to the case, conspiring together to defraud the United States of money by failing to instruct others that they must pay certain taxes.[1562] The prosecutor violated the basic rule of cross-examination: never ask a question of which you are uncertain of the answer. The prosecutor called his first witness, deemed hostile:

Prosecutor. "Defendant One told you that you need never pay taxes on the gain from the sale of your business, didn't he?"

A. "Yes."

Prosecutor. "And for the next two years, you never paid any of those taxes, did you?"

A. "No."

Prosecutor. "And at no time during those years did Defendant Two ever tell you that you must pay those taxes, did she?"

A. "No."

Prosecutor. "And not once during that entire time did Defendant Three ever tell you that you must pay those taxes, did he?"

A. "I *never* spoke with Defendant Three about taxes or any related thing."

Prosecutor. (abrupt) "No more questions."[1563]

[1560] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 25 (1986) (1903) (italics in original).

[1561] The writer has substituted for each of the three Defendant's names, *Defendant* followed by *One*, *Two*, and *Three*.

[1562] Though a defendant's affirmative instruction to another that he not pay taxes could be relevant to a charge of conspiracy to defraud, accusation of failing to instruct others to pay taxes is irrelevant to such a charge. Nonetheless, this failure to instruct was the prosecutor's focus. Omission, failure to act, may be wrong, but can seldom rise to a criminal behavior.

[1563] The writer has reproduced the foregoing exchange from memory.

But it was too late. Having struck "iyle" respecting Defendants One and Two, he "bored clean through" Defendant Three. The Jury found Defendants One and Two guilty of conspiracy, but Defendant Three, it found not guilty.

Bias of a witness is always relevant, but is so well woven into a witness's soul as to be a part of his personality, but hard to wring out. Even so, on occasion, a cross-examiner squeezes here and there, gains a new fact, gives the witness a new twist, and the admission of bias hops out. The right to cross-examine, as the rest of due process, gives no certainty truth will turn up, but it does give opportunity for truth.

Following are excerpts from the cross-examination of the government's chief witness in a federal criminal trial. At the prosecutor's behest, the Grand Jury had charged the defendant—a hard-working, peaceful and loving mother, wife, and grandmother with no criminal record, not even a traffic ticket—with crossing a state line with intent to extort[1564] from the witness $40,000, which he, withal, had already confessed to have stolen from her. Moreover, the witness stood six feet, five inches and weighed 270 pounds; his victim, the defendant, was five and a half feet and weighed 120 pounds. At the time of his testimony, he was doing time in federal prison for his theft.

The cross-examiner's object was, first, to show the futility of anyone with a lick of sense—such as the defendant—to attempt, by force or threat of force, to bully a man of his size, physical confidence, and brass into returning her stolen money; second, to get an admission of bias against the cross-examiner's client.

The prosecutor's evidence intended to reach and snag the defendant was circumstantial only and rotten with less-than-honest testimony. Nonetheless, the day before, this witness was in the harness of his plea agreement with the prosecutor holding the reigns of direct-examination; the witness had trotted for the government well. Then counsel for the other defendants had a go at him, and by skill borne of experience, drew out valuable testimony. The following morning, federal marshals led the witness, a giant of a man, shackled, into the courtroom and he took the stand:

Q. "Good morning Mr. Muldune."

A. "Good morning."

[1564] *Extortion* is the crime of attempting to take property from another by force or by threat of force.

Q. "You have perfected the art of separating people from their money. Would you agree?"

A. "I'm not going to agree."

Q. "You separated nine hundred and fifty people, so you testified earlier, from between twenty and forty million dollars; what is the most money any particular one of your victims turned over to you?"

A. "Approximately one million."

Q. "It appears to me that shows a definite ability to separate people from their money. Wouldn't you agree?"

A. (non-response).

Q. "As to the twenty and forty million, how much of that have you paid back?"

A. (non-response)

Q. "You separated people from their money, you weren't able to give it back to them as promised, and you are culpable for that; isn't that right?"

A. "Yes. I accepted responsibility for that."

Q. Yesterday during cross-examination, an objection was raised to the use of the term *con man*. The Court allowed the term. Since then I have been thinking about what euphemism could be used, something less-harsh to the ears, that would still accurately describe your craft and trade—

Prosecutor. "Objection. Your honor, counsel is testifying."

The Court. "It *is* argument counsel."

Q. "Can you think of any term that would sanitize your profession?"

Prosecutor. "Objection, relevance."

The Court. "Sustained."

Q. "Yesterday, you described some of those that have given you money, using the word *investors*. Wouldn't it be more accurate to call them victims of your fraud?"

A. "They ended up being victims, that's correct."

Q. "And it is your understanding, so you testified, that the monies you took from your victims were loans, and, as such, the money no longer belonged to them; thus, you were free to do with it as you pleased; is that not correct?"

A. "I believe I referred to that, yes."

Q. "You are educated, if I heard your testimony correctly, in the area of finance from Utah State University?"

A. "University of Utah."

Q. "Pardon me, University of Utah. And it is your understanding that when people loan you money, it is a *security* under the terms of the law?"

A. "Yes."

Q. "Then a loan can be a security under the terms of the law?"

A. "Yes."

Q. "As such, it is your understanding also, that you are governed by certain securities laws, by which you must abide in order to be within the law?"

Prosecutor. "Objection, relevance."

The Court. "Overruled."

A. "Correct."

Q. "When you separate people from their money, as you do, you do expect a few of your victims to be angry?"

A. "No.

Q. "It is true that many of them do get angry, isn't it?"

A. "Yes."

Q. "And it has been this way ever since you have been plying your particular business. Anger from your victims is part and parcel of your craft and trade. Isn't that not true?"

A. "I wouldn't say that."

Q. "But people do get angry and you have a plan in place to deal with that anger, to pacify it and placate them. Is that true?"

A. "That's true."

Q. "In fact, at a point-certain in the process, after separating your victims from their money, you send pre-drafted letters to them for that very purpose, correct?"

A. "Correct.

Q. "Now, my client has never threatened you physically, or any other way, correct?"

A. "Correct."

Q. "In fact, she did all that she could do to diffuse any potential confrontation between you and any other person, correct?"

A. "Yes."

Q. "Now, while you were at my client's home, you promised to return some of her money, correct?"

A. "I don't recollect the exact statement."

Q. "But you promised to return some money?"

A. "Yes."

Q. "Now, making a statement like that, in other words, a promise, is just the normal course of procedure in your particular craft and trade, isn't it, to placate your victims?"

A. "Sometimes you do things under duress."

Q. "It does not require, and it never has required over the years you've been in business, force or threat of force to induce you to lie to your victims?"

A. "I will agree with that."

Q. "Yesterday the government flashed a photograph of you up on the screen for the jury to see; I couldn't help but notice; you sport a healthy brisket. You are a robust, strong, man; don't you agree?"

A. "I figure myself to be in pretty good shape."

Q. "When you were in high school, did you play sports?"

A. "Yes."

Q. "What did you play?"

A. "Baseball, football, basketball."

Q. "What position did you play on the football team?"

A. "Outside linebacker."

Q. "Basketball, football, baseball; what else?"

A. "Wrestled some."

Q. "You stayed at it year 'round, sounds like. You were very athletic. Did you play college sports?"

A. "Yes."

Q. "What did you play?"

A. "Football and baseball."

Q. "Scholarships?"

A. "Yes."

Q. "Pretty good at all of them?"

A. "Well enough to pay for school."

Q. "You were fortunate to have been endowed that way. I don't get the impression that you live your life in fear of other people; is that true?"

A. "No, I do not."

Q. "Such is often true of men who are competitive and play college sports. It is competitive; wouldn't you agree?"

A. "It is."

Q. "You learn to be tough in the face of competition; isn't that right?"

A. "You do."

Q. "In fact, from what I perceive of you, you appear a bold man; is that a fair statement?"

Prosecutor. "Objection, vague as to the meaning of *bold*."

The Court. "Sustained."

Q. "I will try another word. *Brazen*. You are a brazen man or at least you can be?"

A. "I don't think that denotes my character, no."

Q. "It takes feelings of flint to take, without batting an eye, all the money a person has put back over a period of years for a modest retirement, knowing you are never going to return it, correct?"

Prosecutor. "Objection, vague."

The Court. "Sustained."

Q. "You stand in no fear of my client, correct?"

Prosecutor. "Objection."

The Court. "I don't understand that question, *stand in fear*. Are you talking about presently? Are you talking about in the past?"

Mr. Winters. "I will clarify, your honor."

Q. "You do not presently stand in fear of my client, correct?"

A. "Presently, no."

Q. "No. I don't think you have ever stood in fear of my client in the past either; is that not correct?"

A. "It depends."

Q. "Let me expand a little. It appears that you don't stand in fear of prison. Is that not correct?"

A. "I don't stand in fear of it, no."

Q. "You have been in prison and out three times, is that not correct?"

A. "Probably four times now."

Q. "Each time you got out, you went back to prison on similar charges; is that not correct?"

A. "That is correct."

Q. "So each time you came out, you went right back to doing what you were doing before, the very things that had sent you to prison, and then you went back again; is that not correct?"

A. "That's correct."

Q. "So each time you came out, you were not afraid. You were *bold* enough to move forward and do the very thing you had done to send you to prison before. Isn't that true?"

A. "I didn't fear it, no."

Q. "Is it not true that you took my client's money with no intent to return it?"

A. "It resulted in that effect, yes."

Q. "Isn't it true that you now assist the government to take away her liberty?"

Prosecutor. "Objection. Argumentative."

The Court. "Sustained."

Q. "In your testimony—maybe you can clarify this for me—you stated that you would rather the government *pay my client back* than have to return her money? Did you mean by that, that you wanted the government to pay her back for demanding that you return her money by convicting her?"

A. "No. That is not what I meant at all. What I meant was, it is better to pay the government. The government is already deemed to be her protector, her benefactor."

Q. "You are not suggesting that the government appears her benefactor today?"

Prosecutor. "Objection. Argumentative."

The Court. "Sustained."

Q. "There was much talk yesterday during cross-examination concerning your plea bargain. You do recall that part of your testimony?"

A. "Yes."

Q. "You *have* entered a plea bargain with the government in this case?"

A. "Yes."

Q. "Now such a plea bargain is negotiated, isn't it?"

A. "Yes."

Q. "So when you negotiated the plea bargain, you *bargained*, right?"

A. "Yes."

Q. "You cut a deal?"

A. "In effect, yes."

Q. "To settle on a bargain for a plea, you have cut a deal with the government, correct?"

A. "Correct."

Q. "Well, since you cut a deal, that means you bargained, you dealed, you promised to give the government what it wants, so that you can get something you want, correct?"

A. "Okay."

Q. "You do agree with that statement?"

A. "Well, you have an interesting way to present the question. But for your purposes, you are correct."

Q. "I want you to understand; if you don't, please tell me. Well, if you bargained, that means you got something in exchange for something else, correct?"

A. "That is the definition."

Q. "You understand contracts. You are in finances. The government brought you here today to testify for the government, correct?"

A. "Correct."

Q. "There was much talk yesterday—Rule 403 came up quite a few times. I had to reach back in my memory. It is about relevance. Rule 403 is about relevance. Fundamental. But I remembered one thing, as I thought about that. I remembered something that is always relevant, and that is *bias*."

"It fair to say that you had meetings with the government, where you agreed to *leeean* toward the government in your testimony today, and not to lean over here toward my client. In other words, you are biased."

Prosecutor. "Objection."

The Court. "I am going to overrule the objection."

A. "I guess you could say that."

Q. "You testified that you made your living as a con man. Is that correct?"

A. "I guess you could say that."

Q. "And you have been convicted, repeatedly, for deceiving people out of their money?"

A. "Yes."

Q. "You have made a lifestyle out of lying since 1979, when you left Merrill Lynch and went out on your own. It has been a long time. All of that lifestyle deceit, but, *today*, you want the jury to believe you?"

A. "Correct."

Cross-examination, being a creature of the common law, has no part in civil-law tribunals, nor is its ideal even a part of a civil-law country's culture. For a fellow to fully appreciate cross-examination as a weapon indispensable to fair play, let him, says Stryker, attend a tribunal in France, where cross-examination is forbidden:

> There the judge and not the advocate is the cross-examiner, and there, amidst the general turmoil, he is permitted to

> engage in relentless sarcasms and exhortations that would sicken an American or English lawyer. The French judge is a frank partisan, though not so frank as he might be, and so, having taken a leading part in the conflict, debars himself from ordering an impartial trial.[1565]

"Cross-examination," says Mr. Wellman, "is a mental duel between counsel and witness." The common-law tradition maintains a sense of fair play of which an essential feature is cross-examination. Indeed, the common law tradition's sense of fair play is the fundamental distinction between the common law and the civil law. Anglo-American due process, which includes cross-examination, states Wigmore, "is more or less due to [an] inborn . . . instinct of giving . . . fair play even at the expense of efficiency of procedure." For "the common law . . ." he continues, "[is] permeated essentially by the instincts of . . . fairness . . . ."[1566] To forfeit the litigant's right to cross-examine is to forfeit fair play, lose truth, and abandon freedom:

> [N]o better means have ever been invented for the discovery of truth than that of cross-examination. No more efficacious test of credibility has ever been devised. It is a typically Anglo-Saxon weapon.
>
> It is a sword for cutting through and destroying perjury. It is the bulwark of liberty. Let us find the men to man this rampart and hold it at all costs.[1567]

§ 5.1.5.5
Powers:
Separate –*vs*– Combined

[Justice] Harlan declined to vote in any Presidential elections (or any other) and never applauded at the President's State of the Union Address . . . Harlan persuaded the others to abandon the practice of calling on the President, lest [President] Johnson try to use them to legitimize his war effort as well.[1568]

[1565] *Id.* at 75.
[1566] *Quoted in id.* at 75.
[1567] *Id.* at 84.
[1568] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 127 (1979) (parenthetical in original). Justice Harlan of the United States Supreme Court was sensitive to the importance of separation of powers and independent courts and, therefore, careful to avoid any appearance of familiarity with the executive.

Separation of the powers of government is fundamental to the common law. When the civil lawyer, however, speaks of separation of powers, he intends a doctrine contrary to the common-law ideal. The common-law tradition separates the three powers of government, confining each to its own job: the legislative power only legislates, the executive power only enforces the law, and the judicial power only applies the law in specific cases. The common law further forbids that any one of these three powers be allowed refuge in the discretion of either of the other two. Any of the three powers can support the other two, but only in its unfettered discretion.

In the civil-law tradition, however, separation of powers means that the legislating power separates from the courts the power of discretion and gathers it to itself, thereby reducing the judge's job to applying the Code as commanded by state legislation—in uniform precision. Civil-law tribunals are, therefore, mere agents of the legislative power. Separated from the power of independent judgment and interpretation, the civil-law judge is a cleric under a duty to enforce the state's regulatory will, "[His] service is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative."[1569]

§ 5.1.5.6
Judicial Dissent –*vs*– State Solidarity

The common-law tradition includes its appellate courts' dissenting opinions along with their majority opinions; judicial dissent among civil-law tribunals, however, is unknown. The common-law tradition recognizes that informed minds engaged in disagreement multiplies the potential for truth to surface.[1570] For this reason, scrupulous observation of common-law due process provides the appellate court minority on any issue with opportunity to declare and explain its viewpoint. In a

[1569] MERRYMAN, *supra* note 82, at 38 (1985).

[1570] Civil-law tribunals restrict admission of evidence more than do common-law courts. Though common-law countries complain about the slow-moving wheels of justice, litigation in civil-law tribunals' is even slower. The common-law trial, when properly done, lays bare all things relevant in rapid, compressed time. The litigant in a common-law trial is comparable to the combatant who, at the choice moment and vital point, brings quick and focused force to bear with a view toward swift and decisive victory. By contrast, the civil law's conduct of its affairs is comparable to the slow detached operations of bureaucratic machinery. The common law of evidence favors openness and a disregard for technical rules of restriction that bars evidence calculated to assist the Jury and judge.

common-law country, minority appellate opinions are also a fundamental exercise of free speech.[1571] Common-law countries welcome dissenting judicial opinions, acknowledging that the cases taken up on appeal are the harder and closer cases, of which men of common sense expect capable judges to disagree.

By insisting that courts publish dissenting opinions, the common-law tradition recognizes first, the majority is fallible; second, even if the majority's conclusion is right, it can be right for the wrong reasons. Because the reasons the court gives for its opinion become the rule of law used to measure future cases on like facts, it is as necessary to challenge wrong reasons as it is to challenge wrong conclusions. Common-law appellate courts are courts of record, publishing their dissenting minority opinions with the majority opinions. The majority opinions carry the binding authority of precedent upon all courts below them in their jurisdiction.

American lawyers sometimes say that the law is whatever five of nine Supreme Court justices say it is;[1572] in most cases, we expect the government to enforce the Supreme Court's decisions. As a matter of constitutional law, however, the Supreme Court's unconstitutional majority opinions are not the law and never were. Such an opinion is void

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[1571] Publication of dissenting court opinions is fundamental facet of the common law's concept of free speech. The Church's frank proclamation of conscience outside of government and the courts' proclamation of dissenting conscience within government insure freedom of speech in all other contexts. See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1572] The law in the United States is not always what five out of nine men in black robes say it is: sometimes the Court harks back and corrects an inaccurate expression of the law on a given point or even an erroneous ruling. Just as the eternal law is not always the view of the majority of appellate justices, neither is the law always that upon which a majority of Americans insist.

Americans, in unity, recognizing true law (the law of freedom) and insisting upon its observance will bring good effect. Remember the Babylonian settlers: observing their unity of purpose for an evil goal (the thwarting of God's covenants) and unity of one language, God stated that nothing shall be held back from them which they have determined to do. See generally *Genesis* 11:6, for the immeasurable potential of unity ('*echdth*) used for a godless purpose. True unity requires commonness at the fundamental level. Unity can work for evil and good: men united for a godless purpose will achieve their goals; men that remain united and consonant with God's covenants and God's means achieve God's goals. Scripture further illustrates the power of unity: "A cord of three strands is not easily broken." *See Ecclesiastes* 4:12. Evenly and tightly wound together, a cord or rope of three strands is equal to the strength of 10 individual strands together but unwound. Any strain taken on a rope having fibers and strands tightly wound together causes the fibers to lend their strength each to the other in a way that multiplies strength exponentially.

ab initio: without authority from its initiation.[1573] In past decades, the Supreme Court has reversed some of its opinions, thereby vindicating the minority's opinion, the dissenting opinion becoming the majority view. Such cases recognize that the minority opinion, being the law's true articulation, holds authority and that where the majority opinion errs, it delivers the color of authority only, encouraging abuse of power. Put another way, the common-law tradition recognizes that not all flying the banner of truth in order to claim truth's authority has that authority.[1574]

If freedom of conscience in speech is to be respected anywhere, a country must demand freedom of judicial dissent, for without it freedom of political dissent will also cease.[1575] By including the written dissents of minority opinions, we declare that nowhere in our common-law tradition do we concede that the majority holds the key to the truth. At the same time, we send a message that the minority bears a special duty to make its position known and understood. A common-law country does not

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[1573] In addressing his State's convention called to ratify the Constitution, Oliver Ellsworth of Connecticut elucidates: "The Constitution defines the powers of the General Government . . . If the United States goes beyond its powers, if they make a law which the Constitution does not authorize, it is void . . . ." *Quoted in* THOMAS JAMES NORTON, UNDERMINING THE CONSTITUTION: A HISTORY OF LAWLESS GOVERNMENT 18 (1950). James Wilson—delegate to the ratifying Convention of the Constitution for the State of Pennsylvania and later Supreme Court Justice—agreed with Ellsworth. *See id.* According to Alexander Hamilton, a law is the supreme law of the land under the Constitution only if enacted pursuant to the Constitution. *See* THE FEDERALIST No. 83 (A. Hamilton).

[1574] The English word *color* stems from an ancient Germanic root meaning *covered* in the sense of protecting that which is covered and in other contexts in the sense of hiding under something. In warfare yet today, to "cover" a fellow combatant is to protect him by suppressing enemy gunfire with gunfire. Sailors later used the term to denote the flag flown over a merchant ship at sea intended to make known the country under whose protection or "cover" the ship sailed, or if a warship, the country under whose authority it acts. For a ship to strike its colors is to haul down its flag and relinquish the *authority* or right signified by its flag. At common law, *color of authority* is mere claimed authority; whether knowingly or unknowingly, such claims, are at times wrong. Just not all those claiming the authority of Christ have received His authority; not all those claiming the authority of law for their actions have received that authority.

[1575] The new-formed United States adopted the custom of the English appellate courts: each participating justice of a case always wrote a separate opinion, called *seriatim opinions*. "Consistent with its legal ancestry, the Supreme Court initially adopted seriatim opinions as an accepted way of announcing decisions." Thomas G. Walker, *Seriatim Opinions*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1992, at 780 (Oxford, 1992).

Supreme Court Chief Justice John Marshall, reasoning that the Federalist Court, by speaking with an undivided voice, would thwart Jeffersonian control of the Presidency and Congress, ended seriatim opinions. Nowadays, no longer forbidden, any one of the justices will write a seriatim opinions as he feel conviction to declare separate reasons for his position, whether of the majority, the minority (dissent), or in the event he agrees with the majority in part and the minority in part. *See, e.g.*, New York Times v. United States, 403 U.S. 713 (1971); Furman v. Georgia, 408 U.S. 238 (1972). *See id.* at 779–80.

honor its courts because they are infallible, but because they are open and frank in their disagreement of opinion, providing reasons for their conclusions. Free men encourage open and frank opinions in all arenas and from all persons—especially in the courts, from lawyers and judges; and in the Church, from the preachers of God's Word.

In the civil-law state, *the powers that be*[1576] fear that dissent in the courts will lower the public's perception of state unity and power, the center pillar of civil law and government. By forbidding publication of judicial dissent, the civil-law state uses the courts as a political tool to create the perception of a unified front of legislative resolve and will. The civil-law state enjoys judicial solidarity among its tribunals because its judges are dependent—civil servants, beholden to their chief-of-state, or even the political party in power, for their position and paycheck:

> In China . . . , which adopted a modern civil code, no dissent is permitted, still less published. The logic is that, once the people should know that even the judges could disagree on a point of law, respect for the law would be shaken.[1577]

The civil-law judge is a component of the state's machinery, bound to insure that the machinery operates smoothly, without interruption. As an engine component's out-of-sync movement sacrifices power; so also, a civil-law judge that fails to synchronize his decrees with the will of the state (legislation) compromises state power.[1578] Of even greater concern

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[1576] See generally app. 18 of this book (discussing the phrase *the powers that be* and William Tyndale's introduction of the phrase into familiar use through his translation of *Romans* 13:1–7).

[1577] WU, *supra* note 39, at 57 (1955). John C.H. Wu served as Chief Justice of Shanghai's Provisional Court. See generally § 3.11.4 of this book (discussing the common-law requirement of independent courts by comparing the English and American traditions of separation of powers).

[1578] Most of the civilized (civil-law) world, in practice, if not in recognized theory, operates, in varying degrees, under the civil-law notion that judges are highly-trained operators of the state's legal machinery, as designed by the scholars and built by the legislative artificers. The civil-law judge and lawyer operate their tribunals as a trained and skilled sawyer operates a sawmill: setting the teeth of the tribunal as the sawyer sets the teeth of the saw. The civilian then operates the tribunal so that the law will cut according to the state's legislative will, whether or not it is lawful is not his consideration. The civil-law judge considers that a jury verdict from which there is no appeal is akin to throwing a wrench in the state's machine, compromising the state's power and his job.

Thus civil-law tribunals operate, either overtly or covertly, according to the demands of political expedience. In either case, however, dependent judges are a necessary component of the civil-law tradition. Independent courts are a necessary aspect of the common-law tradition.

to them holding power over judges in a civil-law state is publication of dissenting judicial opinions, because these threaten respect for state power.

The publication of dissenting judicial opinions reflects our common-law belief in the fallibility of man, the unreliability of majorities, and the eternal majesty of law. Dissenting opinions are consonant with our national motto, *In God we trust*, in that allowance of judicial dissent acknowledges the fallibility of even a majority of judges' and our traditional unwillingness to place unquestioned trust in them, reserving ultimate trust for God alone. Law is only supreme if its giver is supreme, and only personal and compassionate if its giver is personal and compassionate. The corporate state is neither: it is faceless and impersonal; of this danger, common-law judges are responsible to remind us, by their majority and minority opinions.

§ 5.1.6
Revolution:
Reality –*vs*– Utopia

In the first systematic treatise on English law written in 1187 and attributed to Glanville, it was stated that a vassal owed his lord no more than a lord owed his vassal, reverence alone excepted, and that if the lord broke faith the vassal was released from his obligation to serve.[1579]

All authority—the right to exercise power—springs from God. Thus, the abuse of power, being a false claim to authority, one rightly challenges. It is impossible for anyone to have authority without its author, God, granting it direct from himself or indirect through another. Man, being a creature, possesses authority, therefore, only by delegation of the Creator: all human authority is derived.[1580] Since God is the sole author of authority, and since its dispensations of that authority are only by His ordination, its possession and use will always be right. Put another way, it is impossible for anyone to have authority illegitimately or to misuse authority because one cannot wrongfully hold or exercise that which is

[1579] BERMAN, *supra* note 9, at 306–07. The principle of which Berman writes is *diffidatio*. See infra this § 5.1.6. Over a period of years, the mother country broke faith with the American Colonies, not only in custom, but also according to written colonial charters.

[1580] The recognition that authority never finds its originating source in man is expressed by our phrase of derision, "He acted of his own authority": that is, without authority. *See, e.g., Genesis* 1:28, where God granted authority to Adam and Eve; *John* 1:12, where God has granted authority to each believer. *See also Luke* 9:1, 19:17.

one's right.[1581] Thus, to exercise power without authority is not to misuse authority; it is, rather, to act outside authority's scope—to act without warrant.[1582]

Since all men must derive authority (a right) held from God, it follows that to rebel against any authority is to war against God. Further, if *revolution* is rebellion (making war) against God's instituted authority, revolution is always wrong: i.e., there is no natural right of revolution. Against unauthorized acts of state power, however, there is a natural right of resistance that follows lawful (consonant with Scripture) channels of procedure, such as exercise of the right of petition for redress of grievances, the right of access to a genuine court, and the right to judicial appeal. All these failing after genuine and patient attempts, resistance by force may be right, but only in extraordinary cases. The Parliament's war with the royalists and the American Colonists' war with England were such cases, and thus, worthy of pondering. The foregoing distinctions between authority and power were indispensable convictions to the English Parliament in their war with the Crown and to the American Colonists in their war with Parliament and the Crown.

The English and American revolutions so-called were not wars (rebellions) against authority—i.e., against authority God had ordered—and, therefore, are distinguished from most other movements called revolutions, and particularly from those called revolutions in Western culture.[1583] Parliament's war against the royalists and the Americans' war against Parliament and the Crown were, rather, humble but firm requests that became demands, that the king (in the case of the English) and the king with Parliament (in the case of the Americans) remain within the constitution of divine authority, as the common law required. The English insisted that British kings never claim rights that belonged to God alone; later, the British-become-Americans insisted that the British

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[1581] A lawless act is an unauthorized act because without authority there is no right; that done without right is lawless.

[1582] It is impossible to usurp authority. Authority is static and only known in its exercise of power. Only power is usurpable, notwithstanding misunderstandings of 1 *Timothy* 2:12. Early translations of this verse into English present authority as something *usurpable*. However, no term for *authority* is in this verse; instead, Paul the apostle uses terms signifying positions of domination (*ανθεντειν: authentein*) and subjection (*ησυχια*: *hay-sue-chea*), these being usurpable. "As to teaching [*διδασκειν δε* (*didaskein*): dependent clause]," says Paul, "I do not allow a woman to hold a position of domination toward a man." *Id.*

[1583] *But see generally* BERMAN, *supra* note 9 (claiming for its proposition that the War of American Independence was identical in substance to the papal, French, and Russian revolutions).

king with Parliament not usurp these same divine prerogatives. Moreover, the English and American wars against imperial power were both in response against, not extensions of, the papal revolution's civil-law doctrines.

The American Colonies made a withdrawal of faith from England (dissolved their relationship with the mother country) under the common law's *diffidatio*, signifying despair of distrust. Under this doctrine, if one party breaches the obligations of his relationship to another party, thereby causing serious injury, the injured party is empowered, by right, to dissolve the relationship by *diffidatio*: a solemn gesture of defiance toward the misuse of power. In the case of the American Colonies, this solemn gesture was the signing of the Declaration of Independence. *Diffidatio* is a common-law principle, and its right is inherent in the common law's ideals of limited government. Glandville was the first common lawyer to articulate in writing the doctrine of *diffidatio*.

By contrast with the British and Americans, the papal revolution,[1584] having begun in the eleventh century, followed by the French and Russian revolutions, were extensions of civil-law doctrine and power, with one set of usurpers driving out another. Rome's papal revolution, ambitious to dominate all other kings and people, sought to usurp God's place. The French and Russian Revolutions, progeny of the papal revolution, sought, by appealing to vengeance drawn from class hatred, to transfer civil-law power from one set of tyrants to another. Following civil-law ideals, France declared human reason ultimate and enthroned the goddess of reason on the steps of Notre Dame Cathedral; Russia also declared human reason ultimate, as expressed in the will of the state, and swore to throw God from heaven.

The French and Russian revolutionaries sought to dethrone tyrants, while retaining the tyrants' civil-law precepts to be exercised by the majority's chosen leaders: the French vowed to strangle the last king with the guts of the last priest;[1585] the Russians claimed to give rule to the

[1584] See generally § 2.8.2 of this book (discussing the beginnings of the papal revolution and its claimed justification by reason: the *Corpus Juris of Justinian*).

[1585] Rousseau's writings were central to French revolutionary thought. According to Sir Henry Sumner Maine, Rousseau's writings launched a prodigious influence over the minds of men. He was, says Maine, "that remarkable man who, without learning, with few virtues, and with no strength of character, has nevertheless stamped himself ineffaceably on history." Study of the ancient literature of the Hebrew people—and especially the Pentateuch of Moses—is the remedy, says Maine, against the destructive results of Rousseau's ideas. "Unfortunately," writes Maine, "Rousseau, as well as Voltaire, was especially disdainful of the antiquities of the Hebrew race." The philosophers of France

people. By state ordained demonstrations of science so-called, Russia's communist leaders sought to raise the concept of revolution to a respectable science; their veneration of revolution and revolutionaries, however, has rather, sanctified brute cruelty.

Both the French and Russian revolutions sought to revenge the past and eliminate its memory from the future. Though both revolutions touted their ideas as new, they were not. Beginning with Nimrod, and expressed through Justinian—and even beyond to the present—; the declared policy of the civil law has been to end the influence of the past and establish the utopian state:

> Justinian, when he promulgated the *Corpus Juris Civilis*, sought to abolish all prior law . . . Similarly, the French, when they codified their law, repealed all prior law . . . In both cases, the aims were essentially utopian . . . A[ny] law that had its origin in an earlier time, before the creation of the state, violated . . . [the] statist ideal.[1586]

Thus, both the French and Russian revolutions claimed to usher in the establishment of a new and ever upward-evolving utopia, where the will of man, dictated by the reason of the scholar, will rule. Both, however, resulted in unprecedented lawlessness and chaos, followed by dictatorship's human slaughter. By contrast, the American Colonists sought to insure the future by upholding ancient and proven common-law principles, consonant with Scripture, resulting in unprecedented liberty confirmed in law, followed by peace and prosperity.

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followed their disdain of the Hebrew Scriptures. "Debarred, therefore, from one chief security against speculative delusion, the philosophers of France in their eagerness to escape from what they deemed a superstition of priests *flung themselves headlong into a superstition of the [civil] lawyers*." MAINE, *supra* note 639, at 73–74 (emphasis added).

[1586] MERRYMAN, *supra* note 82, at 27. God's standards, being eternal and real, are at odds with the civil law's utopian ideal because it is temporary (existential) and illusory. Nonetheless, says Howard Hendricks, "men continue to build their sand castles, year after year and age after age, only to watch the rising tides of reality wash them out to sea."

Bismarck, with enactment of his civil-law Code, and Hitler, carrying that Code's ideals to their unlimited conclusions, set out to establish a new and better order, as have the communist states. These humanistic attempts to create utopia, however, each ended in a culture of death. Any new ordering of this world (a new world order) amounts only to a reshuffling of its unredeemable confusion for which Christ stated He will not pray. *See John* 17:9. Scripture reveals that this world (*κοσμος: cosmos*) lies in the lap of the evil one. See generally app. 3 of this book (discussing the New Testament Greek term *cosmos*, translated "world").

The civil-law tradition is the product of rebellion: a revolting determination to establish a detailed legal certainty for the future by usurping God's place. This same drive for certainty is the attitude "that led France," during her Revolution, "to adopt the metric system, decimal currency, legal codes, and a rigid theory of sources of law, all in the space of a few years . . . ."[1587] Passionate utopianism,[1588] said Tocqueville, became a species of religion and state glorification was its characteristic. Such utopian revolutions, while stirring and fueling the coals of past hates, attempt to enthrone human reason as sovereign, ignore the distinction between law and its application by demanding legislative control of the judiciary, and concentrate all power in the single will of the state's legislature, or its executive as sole legislator. The French revolutionaries, for example, denied all power to the courts to pass judgment upon the state, a denial that persists into the present.

By contrast, in England's war with the monarchists and the Americans' war with Parliament and the Crown, intense fear of the courts was nonexistent for two reasons: the common-law Jury remained central and there existed a pervasive confidence that their common lawyers drew breath and practiced law in the atmosphere of the common-law tradition. Americans then refined and put to writing in their Constitution the common-law tradition of checks and balances, thereby affirming the coequal status of the judiciary branch with the executive and legislative branches. Moreover, the common-law courts on America's enlarging frontiers developed a reputation for protecting individuals and their relationships against the ever-reaching hand of state power, recognizing that the common law was the guardian of the nation. The courts of England and then of the States united in America, had set themselves against the domination of any single will, whether of king or legislature,

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[1587] *Id.* at 25. Merryman adds, "[These] attitudes . . . are still basically alien to the common-law tradition." *Id.* Coffin recognizes the differences between France and England to be fundamental, reaching into every sphere of culture, including law. "[C]onflicting claims led to a great struggle between France and England for supremacy . . . a conflict between two races, two languages, two religions, two systems of laws, two distinct civilizations . . ." CHARLES CARLETON COFFIN, SWEET LAND OF LIBERTY 6 (photo. reprint 1992) (1881).

[1588] Civilians are scholastic in theory and, therefore, utopian in faith. Others besides Thomas Moore have written of utopian theory. Roman archbishop Fenelon, instructor to the Duke of Burgandy under Louis XIV, wrote *Utopia of Salentum*, in which "he puts all men—with their interests, faculties, desires, and possessions—under the absolute discretion of the legislator." BASTIAT, *supra* note 701, at 39. For examples to emulate, Fenelon takes the ancient Egyptian state, and the ancient Isle of Crete, and Crete's lawgiver, Minos. *See id.* at 40. See generally § 2.1.2 of this book (discussing the identity of Minos and his connection to *Genesis* 6:1–4).

choosing instead to allow the truth of the law and its application to surface from where ever it pleases Providence to bring it to light:

> In the common law world, on the other hand, a world less compelled by the peculiar history and the rationalist dogmas of the French Revolution, quite different attitudes prevail. *The common law of England*, an unsystematic accretion of statutes, judicial decisions, and contemporary practices, is thought of as the major source of law. It has deep historic dimensions and *is not the product of a conscious revolutionary attempt to restate the applicable law at a moment in history* . . . In formal terms the relative authority of statutes, regulations and judicial decisions might run in roughly that order, but in practice such formulations tend to lose their neatness and their importance.[1589]

Because the civil law is, at bottom, revolutionary, it seeks to destroy all past wisdom built up over time by replacing it with the theorists' calculations of mind, abstract from the calculus of human experience. Both the common-law and civil-law traditions are all-encompassing mind sets, arising out of antagonistic first principles which go to the controlling questions of human existence, which reach into every area of life. Thus it bears repeating: the difference between the common law and the civil law is not found in two different lists of laws, but is rather found in their contrary controlling first principles that saturate the air in which a people live and move.

Consider the different ways the two traditions measure the natural world. The common law's tradition of measurement arises in spontaneity from the life of creativity, drawing upon common sense and reality in ever-more-fitting applications; the state decrees the civil law's tradition of measurement once and for all, purporting perfection and, thus, superiority over all methods that has gone before and all that will come after. The common law continues to recognize and ratify proven custom, never doing away with past experience, never shutting out future creativity; the civil law, being imperial, decrees once from on high,

[1589] MERRYMAN, *supra* note 82, at 24–25 (emphasis added). The United States has had no reception of Roman law as civil lawyers use the term *reception*: we have yet to accept the fundamental civil-law ideologies as binding. "We [Americans], says Merryman, "have had no reception of Roman civil law." *Id.* at 10.

forbidding the wisdom of the past and the learning of the future. The common-law tradition and the English tradition of measurement arose out of common ideals and thus bear common characteristics. Further, the differences between the common law and the civil law are akin to the differences between the English tradition of measurement and the metric system.

Consider four examples: the English tradition of land measurement, the standards farmers and ranchers developed to measure the capability of fences, the *hand* of tobacco, and the difference between the theorist of geology and the practitioner.

First, the English tradition of land measurement is much more than logic abstracted from life and practice. Rather, it developed over time and according to practice, based on the demands of farming: that is, facts which the farmer can never question and hope to survive but to which he must conform in order to live—*e.g.*, times, seasons, years, weather, strength of draft animals (horse power remains an English unit of power), and limitations of men. Thus, the *hide*, the fundamental unit of English land measurement, is the amount of land ploughable in a farming season, the area of which varied according to local custom and the size of the ploughing rig taken for a standard.[1590]

Second, farmers and ranchers developed standards to measure the capability of fences tied direct to the strength, cunning, and habits of the animal fenced. Phrases such as horse-high, bull-strong, and pig-tight had real and measurable meaning to those working with horses, bulls, and pigs all day, every day, year after year. Such men only need to look at a fence's height, strength, and design to know if it would keep in a bull, horse, or pig.

Third, tobacco was unknown until discovered in the Americas. In short time, however, American tobacco grew into a commercial product of international demand; tobacco farming became an art attended by its own standards of measurement. The tobacco field hand, preparing the crop for market, separated the tobacco leaves into *hands*. Each hand according to one of seven grades: the top leaves (tops) bringing the best price and the lowest leaf (trash), bringing the least. The field hand measured each hand of tobacco by the number of the stalks of tobacco leaves bunched together he was able to grip with one hand. He then tied the *hand* of tobacco together using one of the tobacco leaves. The English

[1590] See generally § 3.2.3.1 of this book (discussing the *hide* as an earl English measurement of land area).

standards of measurement, unlike the metric system, never arose from logicians' conclusions, but from common sense tested through experience.

Fourth, during the bonanza days of wildcat oil drilling in the United States, it was said that if one wanted to learn from where oil came, he must ask a German geologist; but if one wanted to find oil, he must ask an American geologist. The German geologist was known to be learned and disciplined to precise logic. The method of the American geologist, on the other hand, was not limited to logic: to him discovery of valuable minerals was largely fortuitous, achieved by using a little logic based on a lot of common sense.

At bottom, the theorists founded the metric system on a few arbitrary calculations, abstract from any application, designed it for the ease of the theorist and the laboratory, and, in one fell swoop demanded that it alone replace all other systems of measurement in all separate areas of application. By contrast, the practitioner practices the English tradition of measurement by taking into consideration all facts bearing upon its fitness to its area of application and its ease of use to any one needing to use it, regardless of formal training. Thus, historians of the common law-tradition give close attention to the Anglo-Saxon farming villages and their customs. In short, the mindset and way of thinking of these villagers has shaped the character of the common law. Such habits of mind, stressing facts more than logic, even though eluding explanation and failing to answer all abstract questions, works best.

Humanism's notion that all obstructions to utopianism will fall before the exercise of careful reasoning by an intellectual elite has never conclusively seduced the common-law tradition. Truth, as it continues to arise from unexpected quarters, will scatter such science so-called. For example, Nathaniel asked, "Can anything good be out of Nazareth?" to which all of his day accepted the same negative answer. To ask the question, it was thought, was to answer it, for logic dictated the conclusion. The accepted conclusion, however, was wrong; for the best of the good has come out of Nazareth, the unexpected place.[1591]

[1591] *See John* 1:46. For further examples of truth surfacing from unexpected quarters *see also Numbers* 22:30 (truth from the mouth of a jack ass), 1 *Kings* 13:18–21 (truth from the mouth of an otherwise lying prophet), *John* 11:49 (truth from the mouth of an unwitting high priest).

§ 5.1.7
Counsel –*vs*– Dogma

All worship thought to honor and service
thought in obedience invented by the brain of man
without express support of God's Word, is idolatry.[1592]

The Greek political theorists used the term δογμα (*dogma*) to convey the characteristics of the total state: a positive ordinance from a distant and unquestionable authority, a command from which there is no appeal, and a doctrine by which the *powers that be* attempt to force all to give assent. A *dogma*, being from a distant source, is impersonal; being without appeal, discussion and challenge is to no purpose and, thus, disallowed. At bottom, a dogma is imperial, commanding without reason, which is command substituted for reason. *Dogma* signified Roman imperial edicts.[1593] Moreover, idolatry is one's supplanting of one's God-given common senses and conscience with dogmas of men or false gods.

In *Luke* 2:1 and *Acts* 17:7, Luke uses *dogma* for the decrees of the Roman emperor. Paul the apostle also knew the civil-law use and meaning of this term; his use of it provides guidance for one's response to *the powers that be*.[1594] In *Colossians* 2:20, using the verb form of *dogma* in the intensive stem, Paul queries, "Since you, therefore, have died with Christ—clean away from the elemental doctrines of the world—why are you submitting yourselves to *dogmatization*[1595] as though living in the world?" Being in the middle voice, Paul's use of *dogmatizesthee* lays the burden upon the Christian to cease submitting himself to all dogmas: threats, positive decrees, and false doctrines from a distant and unquestionable power, impersonal, lawless, and thus, contrary to the truth of God's Word.

The civil law's *dogma*, being imperial, signifies only that command backed by threat of power. For example, in the writings of the ancient

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[1592] *Taken from* the words John Knox spoken in his defense at inquisition before the Roman bishop of Durham in Newcastle, April 1550; *quoted in* THOMAS MCCRIE, LIFE OF JOHN KNOX 218 (Edinburgh and London, W. Blackwood & Sons 1865).

[1593] In the ancient papyri, the dogma of Severus Alexander is understood as an imperial edict: *τουτου του εμου δογματος [dogmatos] αντιγραφα* [mirror images] . . . . (exact copies of this, my *edict* . . . .). JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 166 (1930).

[1594] See generally app. 18 of this book (discussing the meaning of Tyndale's phrase the *powers that be*).

[1595] Greek δογματιζεσθε (*dogmatizesthee*).

Greeks, *dogma* stood in contrast to *βουλη* (*boulay*): a noun signifying an advisor or group of advisors, acting in concert, i.e., as a "council." So also, in 2 *Peter* 3:9, Peter states that it is not the LORD's *counsel* (*βουλομενος*, *boulomenos*: subjunctive participle) that any be destroyed. Peter's phrase is one of compassionate and personal persuasion, not imperial and impersonal dogmatics. The term *dogma*, therefore, never signified '*η βουλη* (*hay boulay*: the council) because the *boulay* did not command, but instead, reasoned, persuaded, advised, and counseled (verb form, *βουλενομαι: bouluomai*).

Likewise, in the common-law tradition, the courts—having foremost the influence of persuasion, not force—are to exercise judgment wholly independent from the other powers (branches) of government.[1596] Thus, the foremost tool of the common-law courts is to be the strength of their arguments based upon the evidence, not upon force.

§ 5.1.8
Law –*vs*– Legalism

But, it is not solely the heart that moves in you, but also the conscience, the private conscience. But occupying the position we do, private conscience should yield to that imperial one formulated in the Code, under which we officially proceed.[1597]

The only safe channels open to navigate the river of law are within God's principles. To force all boats, however, regardless of size, draft, and pilot skill, to take the same channel within a river will insure the delay or failure of some, if not most. Though all must remain within the banks of life's river, within these banks are different channels of standards or principles; the different channels within the river represent the available applications within that principle. To force all boats into the same channel is like imposing the same application of the principle on all people, disregarding the individual's unique abilities and specific circumstances. Such indiscrimination is *legalism*, which is lawlessness. So also, to demand that disputes arising within human relationships and

[1596] See generally *Hosea* 5:12–14, where God teaches, by analogy, that He prefers to nudge His people in the right direction with the bump of a moth in flight than to become fierce toward them as is a young lion on the hunt.

[1597] Captain Vere's closing argument before the drumhead court (in naval terms called *Captain's Mast*) convened against Billy Budd, sailor. See generally § 5.1.8 of this book (discussing Melville's likely motivation for writing *Billy Budd, Sailor*: Melville was at odds with the legal positivism of his father-in-law Chief Justice Shaw of the Massachusetts Supreme Court).

activities all be swept into the same narrow channel of a legislative provision is to insure failure of justice.

During a 1989 lecture in Columbia, Missouri, Justice Scalia of the United States Supreme Court stressed that when required to interpret a statute, courts must closely follow the legislator's vocabulary and grammar on the theory that, by so doing, courts will force legislators to preciseness in drafting legislation. Seventeen years later, he retained his conviction:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words in a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.[1598]

Doubtless then, facing the following example of legislative ambiguity, Mr. Justice Scalia would make an exception and continue judicial inquiry:

[1598] See Zedner v. United States, 126 S.Ct. 1976 (2006), wherein Justice Scalia holds that implied rights in the Constitution must give way to legislation. Such strict adherence to legislative supremacy is in the Babylonian tradition. In Troxel v. Granville, 530 U.S. 57 (2000), Justice Scalia acknowledges inalienable human rights included within the Ninth Amendment's declaration of reserved rights. He, however, denies enforceability of any implied common-law right unless the Framers explicitly stated it in the text of the Constitution. See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, The Tanner Lectures on Human Values Delivered at Princeton University (8–9 Mar. 1995), for Justice Scalia's presentation of his canons of statutory hermeneutics.

Two new Justices, John Roberts and Samuel Alito, are reputed to share Justice Scalia's jurisprudence. It is significant that Scalia, Roberts, and Alito share a common religious persuasion; though Roberts's and Alito's views remain to be fully seen, Alito has proven willing to examine legislative intent. Legislative supremacy runs contrary to common-law freedoms, but is easily made popular because it satisfies an unholy yearning for certainty and alleviates the labor required to discern truth. *See Hebrews* 5:14. See also *Romans* 12:2, for God's purpose: that God's man shows God's will in specific cases. The Spirit of God, by enlightening (*φωτισθεντας: photisthentas*) one's mind, enables one to discern that which is the good, acceptable, and perfected will of God. *See id.* Because God is willing to show man what is good, He requires of man justice, mercy, and humility. *See Micah* 6:8.

Justice Scalia holds that only those rights expressly stated by the Constitution are enforceable. The Constitution, however, is neither as Justice Scalia holds nor is it divinely inspired as say the Mormons. Both views hold the Constitution as the civil lawyers hold Justinian's Code. The Constitution is instead, an articulation of the principles of common-law government drafted at the zenith of the common law's popular understanding and common experience. Being a common-law document, by its provisions the Constitution acknowledges biblical truth: the naked mind of man is untrustworthy. To enjoy the Constitution's benefits, one must adhere to its original acknowledgement.

> [I]t shall be unlawful for any person or persons to discharge any loaded firearm or firearms in, along or upon any public road or highway in this state except for the purpose of killing some noxious or dangerous animal or an officer in the pursuit of his duty.[1599]

Justice Scalia's standard of interpretation is good; where the language of the statute is unambiguously constitutional, the courts are obliged to uphold legislation. Justice Scalia, however, continues by pushing this canon of interpretation[1600] to extremity: "[T]he use of legislative history is illegitimate and ill-advised in the interpretation of any statute . . . ."[1601] On the contrary, however, legislative history will often assist in untangling ambiguity and revealing unconstitutional bias, which, according to the common law, is always relevant.

Legislative history can be relevant to legislative intent, whether lawful or unlawful. For example, by presenting facts concerning the legislative history of each of the Constitution's Framers and by citing each one's legislative votes on the matter during his Cooper Union address in New York City, Abraham Lincoln demonstrated that the Framers intended slavery to remain confined to the then existing slave states. To follow the doctrine of original (legislative) intent, one must recognize the relevance[1602] of facts of legislative history to the sound interpretation of the Constitution and legislation.[1603] Experience has shown that, given human imperfection, ambiguity—latent and patent—is certain; thus, legislative intent is relevant to the interpretation of legislation.

Mr. Justice Hughes uses the menacing double negative in jest, "[L]egislative ambiguity may at times not be wholly unintentional."

[1599] *See* Dean Pound, "A Hundred Years of American Law," *in* 1 LAW: A CENTURY OF PROGRESS 8 (n.d.), *quoted in* WU, *supra* note 39, at 178.

[1600] See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, The Tanner Lectures on Human Values Delivered at Princeton University (8–9 Mar. 1995), for Justice Scalia's "techniques of textual interpretation, including those particularly applicable to the Constitution." *Id.*

[1601] Justice Scalia's hermeneutic, however, pushed to extremity, is the fundamental policy of the civil-law tradition, relegating the courts to obedient operators of legislative machinery—subservient creatures of the state; captive to legislative ambiguities, intended and unintended.

[1602] *Relevance* at common law means that which one offers to prove or disprove a fact in issue—assuming the offered evidence is true—rendering more or less probable the past, present, or future existence of the fact in issue. *See* JAMES FITZJAMES STEVEN, A DIGEST OF THE LAW OF EVIDENCE 2 (4th ed. 1881).

[1603] 1 BLACKSTONE, *supra* note 12, at 60.

Whether intentional or otherwise, ambiguity remains with us.[1604] The common law's expression is a personal matter made by real people facing real conflicts whose words carry the vivid color of personal experience.

Often different people rightly take such words in different senses.[1605] Scripture certifies the futility of pursuing civil law's goal of absolute legislative certainty, which is *legalism*, not law. God has so designed man that his certainty and trust in true law must grow as a calculus, through obedience to its precepts. Thus, the common-law tradition allows certainty to develop, case by case through experience. For man to seek certainty in the expression of the law that emerges from the abstract reasoning of academia and the speculation of legislators divorced from the lessons of experience has proven fatal to freedom.

Legalism focuses on rules; law focuses on personal relationships. One successfully observes rules of behavior and codes of conduct only where relationships are the first focus. Legalism is an impersonal, calculated, and persnickety attitude toward law that ignores the relationships the law governs. Thus is the civil-law tradition, focusing on rules because these are the commands of the state. For example, in 1794 Fredrick the Great, a Prussian emperor, enacted the *Landrecht* "containing over seventeen thousand detailed provisions setting out precise rules to govern specific fact situations."[1606]

Legislation treated mechanically (legalistically) by the courts becomes abstract, ungrounded, and undiscerning of intention. It distinguishes

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[1604] For example, though it is indisputable that Congress, in U.S.C. 1396p(d), has defined Medicaid *disqualifying* trust, the statute calls these trusts Medicaid *qualifying* trusts.

[1605] In Muscarello v. United States, 118 S. Ct. 1911 (1998), the Supreme Court, by split decision, held that the phrase "carries a firearm" for the purposes of 18 U.S.C. § 924(c)(1)(2) "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." The Court rejected the plain use of "carry," meaning a person's carrying of a firearm on his person. Thus, instead of *carries* being taken in its normal sense, meaning the firearm accompanies the person, the Court gave the word an inverse sense to the word *carry*, meaning the firearm accompanies the person.

[1606] MERRYMAN, *supra* note 82, at 29. Civil law's drive for precision explains its preoccupation with control of the future with preemptive legislation, which, of course, demands accurate prediction of the future. Thus, civil law uses sciences-so-called to try to predict the future, such as behavioral psychology: the study of man's *ψυκη* (*psukay*: physical aspect only); Old Testament נפש (*nepesh*: soul or breath of life) and his soulish conditioned reflexes. This study, however, considers man only as an animal, neglecting his spirit. But, even animals are complex beyond our understanding and react to stimuli in aberrant and never-before-seen ways, how much more so man. Because such so-called sciences fail in their intended purposes, civilians resort to manipulating the future through occultic (literally, concealed or hidden) practices, that is, the deceit of priestcraft and pulling strings behind the scenes.

neither man from beast nor adult from child; whether touched with or without intention, it delivers equal and impersonal force and becomes absurd:

> [A] Chinese woman who had a permit to come to this country landed at San Francisco with a child born on the voyage. The immigration officer asked the authorities in Washington whether the child, having no permit to land, must be sent back to China. In view of the statute refusing immigration without a permit the legal question might have presented difficulties, and the answer was appropriate: "Don't be a damned fool." Now suppose the question had come before a court. Obviously, Congress had no such case in mind, and yet the statute was in terms explicit. If the court, relying on the language of the act, had decided that the child must be sent back, who would have been the "damned fool"?[1607]

[1607] A. LAWRENCE LOWELL, CONFLICTS OF PRINCIPLE 82 (1932), *quoted in Curtis, A Better Theory of Legal Interpretation, 3* Vanderbilt L. Rev. 407 (1950). *Legalism*—adherence to the letter of the law without the Spirit to guide its application—produces lawlessness: legalism is law without respect to relationships and discernment of fitting application, which is no law at all. Herman Melville's *Billy Budd* provides an example of an otherwise fine British naval commander (Captain Vere) falling into the error of legalism, known in Melville's day as *legal positivism*. In Melville's story, Captain Vere decreed the execution of a loyal crewman under his command, while at sea, on charges of homicide of the ship's master-at-arms.

Melville's father-in-law was Chief Justice Shaw of the Massachusetts Supreme Judicial Court; in juridical outlook, Justice Shaw was a legal positivist. Melville wrote *Billy Budd*, it is said, in refutation of Justice Shaw's jurisprudence of positivism. *See generally* HERMAN MELVILLE, BILLY BUDD, SAILOR (Harrison Hayford & Merton Sealts eds., 1962) (providing textual criticism and photographs of the original manuscript).

Found among Melville's papers on his desk after his death in 1891, the transcript of *Billy Budd, Sailor* remained unavailable to the public until 1924. Called by some Melville's last will and testament, *Billy Budd* appears to have found its genesis in the American Navy's *Somers* affair of 1842, resulting in an execution at sea and wrecking the naval career of Melville's cousin Guert Gansevoort, first lieutenant aboard the *USS Somers*. *See id.* at 24–26. Melville, it appears, intends Billy Budd (a man of war crewman impressed from a merchant ship's crew) to correspond to God the Son, Claggert (the master at arms) to correspond to Satan, and Captain Vere to correspond to God the Father. Moreover, that Melville intended such analogies is in keeping with Melville's *Moby Dick*. Such analogies, however, are speculation; one could justifiably conclude otherwise.

Melville portrays Captain Vere as a man of compassionate insight into human nature, whose enthusiasm was to read and deeply contemplate any history that revealed the motivations of men, yet Vere was a legal positivist. In short, Vere put the will of the imperial Code in place of his own conscience. Vere's closing argument at the *Captain's Mast* (in army terms *drumhead court*) convened against Billy Budd reveals Vere's affinity for the fundamentals of imperialism. Considering only the prisoner's overt act, Vere argued for judgment of guilt regardless of the extenuating circumstances: judging to shameful death a

Nonetheless, tight adherence to statutory language is the policy of the civil-law tradition. Such practices have crept into common-law countries through administrative bureaucracies, which tend to follow the civil law's policy respecting their administrative regulations, and even legislative acts, construing the language in favor of achieving the will of the state, upon whom bureaucrats rely for their position and living.

The purpose behind Justice Scalia's policy of strict statutory interpretation is to force the legislature to be clear in drafting legislation. Though attempting to force the legislature's hand in this way is with good intention, this method will also force violation of the common-law principle demanding that courts never miscarry justice toward the parties before the court by following obvious flaws in legislation to absurd[1608] conclusions. In effect, Justice Scalia's method upholds the civil law's theory: i.e., legislation being supreme, the courts must look only and strictly to the language of the Code. The common law's recognition of the fallibility of legislation, however, remains intact. Under the common law's separation-of-powers doctrine, the courts are to determine the lawfulness of challenged legislation by reviewing and testing it against the common law's first principles. Known as judicial review, the courts have authority to weigh acts of the executive and legislative branches, and where found wanting, to find them unconstitutional, viz., unlawful.

An American appellate judge, says Justice Scalia, spends nearly all of his time interpreting statutes and regulation. The same has become true in England, where "[i]n 1943, 23 out of 37 reported cases in the Courts of Appeal were concerned with the meaning of legislation. Nowadays the percentage is over 90%."[1609] This problem is not new, but it now dominates.[1610]

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creature innocent before God, whom the court also felt to be so. Private conscience, said Vere, must yield to that conscience imperially formulated in the Code under which the court martial must officially proceed. Vere acknowledged that before a less-arbitrary and more-merciful court than a martial one, private conscience largely extenuates. Under an imperial code such as the naval code, however, intent or non-intent is nothing to the purpose; military necessity must prevail; the end justifies the command.

[1608] "The doctrine of the [common] law . . . ," says Blackstone, "is this: that precedents and rules must be followed, *unless flatly absurd or unjust*." 1 BLACKSTONE, *supra* note 12, at 70 (emphasis added). The common law presumes that former findings were for good reason, placing the burden to show otherwise on the challenger.

[1609] HEWARD, *supra* note 386, at *Introduction*, *citing* 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 52 (12th ed. 1794). Regardless of how well pondered, legislation tends to enlarge, not lessen, confusion.

[1610] As Mr. Justice Hughes reminds us, ambiguities are sometimes intentional. Even the most learned Bible translators with well-deserved reputations for accuracy have failed to

For every canon of statutory construction, wrote Karl Llewellyn, there is another canon stating just the opposite.[1611] For example, "A statute cannot go beyond its text," but at the same time, "To effect its purpose a statute may be implemented beyond its text." Further, for any given legal issue, there is often more than one correct answer. Knowing the grammar, vocabulary, and even the purpose of a statute are necessary to its interpretation, but are seldom enough. Indeed, a purpose can be fulfilled in several different ways. Thus, in a common-law court, reasoning is seldom a pure syllogistic exercise, but a pursuit of reasonableness: fairness, or equity, instead of the preciseness of mathematical equation. In deciding a case, says Llewellyn, a court must first grasp the good sense of the situation, and then, if the meaning of a statute is at issue, apply those interpretative canons that are appropriate to the situation to arrive at a meaning that is reasonable, honest with the language, and true to the statute's purpose.[1612]

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avoid ambiguities, if only due to the irresistibility of humor. Over the centuries, Bible readers have criticized the King James Bible translators for their ambiguous rendering of the Hebrew in 1 *Kings* 13:13, "And he [the prophet] said unto his two sons, *saddle me* the ass." Then, as if that reading fell short of confirming the prophet's character, the translators continued, "So *they saddled him* the ass." By providing the phrase following, however, the Hebrew author resolved the translators' ambiguity: "and he [the prophet] rode thereon."

Using English idiom, the translators omitted—as also *Genesis* 15:9 and *Exodus* 25:2—the Hebrew preposition ל (*lamedth*: for) from both inseparable prepositional phrases: from *lamedth yodh* לי ("for me") and from לו *lamedth wow* ("for him"). The accurate translation thus runs: "saddle the ass *for me* (לי) . . . So they saddled the ass *for Him*." (לו). If learned linguists of the highest reputation for accuracy, such as the translators of the King James Bible, by negligence or otherwise, have, chosen ambiguity, how much more will legislators—often undisciplined to such matters and driven by personal passion and political intrigue—be unable to avoid ambiguous and even senseless legislation.

[1611] Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,* 3 Vanderbilt Law Review 395 (1950).

[1612] "[C]anons of construction are never the masters of the courts but merely their servants, to aid them in ascertaining the legislative intent." Ott v. Great Northern Ry. Co., 72 N.W. 833, 834 (Minn. 1897) (dissenting opinion of Justice Mitchell). The material and much of the sense of the foregoing paragraph is taken from the presentation of John Simonett before the Joint Spring meeting of Minnesota's Inns of Court, held at St. John's University, April 2001.

§ 5.1.9
Universities:
Humanism's Purpose –*vs*– Divine Providence

[I]n Italy . . . the juridical science of modern Europe [scholasticism] took its rise . . . the schools founded by emissaries of the Italian universities in all parts of the continent [were] attempted (though vainly)to be set up in [the British] island.[1613]

At any given time after the year 1088, four to ten thousand students from all parts of Europe were at Rome's newly established model university law school at Bologna, Italy, studying civil law; this school's impact remains substantial. Soon after that year, all Europe looked to the university law school at Bologna to understand Roman civil law, to establish the (supposed) consistency of all other academic disciplines with Justinian's Code, and to provide professors for universities established after the model at Bologna.[1614]

Though mistaken, albeit in good faith, the Christian world generally assumes that universities in Europe are the product of Christian thought intended to unify all disciplines of learning under the biblical understanding of the Godhead: one LORD, one faith, and one baptism[1615] according to one standard, the Bible. On the contrary, Rome instituted her universities for two reasons: first, to unify all disciplines of learning under Rome's power according to the universal application of Justinian's Code in place of God's Word written; then, to use that Code to justify the *status* or state power then in place—Rome's church-state. When God, however, unleashed His Word through the reformers' translations of the Bible into the major European tongues, the Bible began its challenge of Justinian's Code in earnest, especially in the universities at Oxford and Cambridge; the world stills feels the authority that rivalry settled.

[1613] MAINE, *supra* note 639, at 66.

[1614] Rome duplicated the world's universities after Gregory VII's model in Bologna, much as the modern American humanist movement duplicated the teachers' colleges after John Dewey's model at Columbia University. Rome's universities and the teachers' colleges are in veneration of the mind of man as the standard for testing truth.

[1615] *See Ephesians* 4:5. Rome fashioned her universities in Babylonian tradition. In this sense, Rome's universities were not new, but only had a new label, a new location, and used to prop up a new revolution. These facts of history, higher Christian education has forgotten, seeking within the last few decades to reclassify themselves as *universities* and to rearrange their affairs in the civil-law order, but failing to replace the civil-law Code at the controlling center with Scripture. Whereas, the Bible was once the guiding rule of the entire Christian college, upon claiming university status, the Bible is confined to a school of theology. Greek scholastics are at the center, with all other disciplines around it and conforming to it.

The young William Tyndale tried to persuade one Roman priest that the duty of the church in England is to translate the Bible into English. To Tyndale's surprise, the priest said that England was better off with the laws of the church (the civil-canon law) without the law of Christ (the Bible), than it would be with the law of Christ but without the laws of the church.[1616] This priest affirmed Rome's position: civil law stood above Scripture[1617] and solidified Rome's power. Translation of the Bible into English, however, will dissolve the domination of the civil law.

Understood in this way, Rome's strangling and burning of William Tyndale was foreseeable, especially to the one of scriptural conscience. His translation of the Bible threatened the ruling class's lifestyle and power at its foundation: the civil law's priestly prerogatives. These prerogatives also help explain why Oxford resisted John Wyclif's plan to replace the teaching of the civil law with the teaching of common law. Study of the common-law tradition encourages study of the Bible, eclipsing veneration for Rome's *Corpus Juris Civilis*, the foundation of priestly power. University resistance, nevertheless, persisted for centuries, but Oxford finally gave way when William Blackstone became the first to teach common law at there, over 500 years after Wyclif insisted upon it, over 200 years after the Reformation, and one-hundred years after England had defeated the civil law's divine-right-of-kings doctrine (absolute monarchy).

Rome knew that the battle for truth is first in the mind; for this reason, the university system became a scene of strife in England between Rome's civil law and biblical authority. In this conflict, Providence operated in curious fashion through Henry VIII. If one wishes to learn the popular point of view in England on any particular issue during the days of William Tyndale, one need only to uncover the position of Henry VIII.; for Henry's political method and skill was to

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[1616] Tyndale's response not only betrayed his indignation at priestly arrogance, but also revealed his ambition and incited the ire of the priests toward him. "Why shouldn't England have the oracles of God in her mother tongue?" asked young William Tyndale, "If God spares my life, I will, before many years have past, cause the boy that driveth the plough to know more of the Word of God than the priests." Tyndale intended, as the great object of his New Testament translation, to enable every "PLOUGH-BOY" to know more of the Scriptures than the "ancients." *Cited in* ROBERT YOUNG, ANALYTICAL CONCORDANCE TO THE BIBLE, "Prefatory Note to the First Edition" (1972) (n.d.) (capital letters in original). Knox Hyndman of Belfast tersely captures the priesthood's attitude toward young William Tyndale: "They didn't like 'em."

[1617] Rome also held that the Roman Church stood above the Bible because, said Rome, the Roman Church produced the Bible and not the Bible the Roman Church. The reformers disagreed.

discern the position that best endeared him to the greatest number of England's people and then to act on it. Though without innocence, Henry was winsome.

Henry VIII. was a consummate politician, gaining, in his fight with Rome, the support of Oxford and Cambridge Universities. Even in the case of his determination to divorce his first wife—a Spanish princess devoted to the Roman pontiff—Henry was shrewd, justifying his divorce in a manner that proved irresistible to the English: Henry VIII. appealed to the Bible. "The king's argument was simple and popular: 'The pope cannot dispense with the laws of God'; while the queen, by appealing to the authority of the Roman pontiff, displeased both high and low."[1618] In derogation of Rome's craving to dominate England's universities, Henry VIII. relied upon the biblical texts as espoused by Cranmer and the other teachers at Oxford and Cambridge. Whether their interpretation concerning Henry's divorce was right or wrong was secondary[1619] to the greater and further-reaching precedent settled by seeking final authority in the Word of God written and not in the Roman pope. By so doing, the English universities, intended as Rome's tools, set themselves against the Roman pontiff and his law.

England's resistance against the propagation of civil law through the prestige of academic institutions is as old as Babylon. When Israel entered the land of Canaan, it faced, as we do yet today, humanism's institutional foundations of false intellectualism. In modern times, false wisdom has hidden behind names such as Greek wisdom, scholasticism, and humanism. Over the centuries, the names have changed, but the problem remains the same.

For example, *Joshua* 15:15 provides a proto-type of the task set before God's people in all ages: to replace the institutions that compile godless academics with institutions faithful to teaching the oracles of God. Caleb and his clan conquered the Canaanites' repository of humanistic learning, signified by the Canaanitish-Semitic phrase *Kieryath-sayfer*.[1620] Gesenius's editors Brown, Driver, and Briggs translate this phrase with *scribe-town*. The Egyptian equivalent means "house of scribes"; the Greeks called it "city of the scribes."[1621] In today's terms,

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[1618] 1 D'AUBIGNÉ, *supra* note 19, at 412–13.

[1619] Concerning the first divorce of Henry VIII., reformers on the continent, including Martin Luther, disagreed with the interpretations of pertinent Bible passages made by faculty members of Oxford and Cambridge.

[1620] Hebrew: קִרְיַת סֵפֶר.

[1621] Greek: *πολις των γραμματων* (*polis ton grammaton*).

Kieryath-sayfer was a university town devoted to the autonomy of the human mind. Israel replaced the Canaanitish name *Kieryath-sayfer* with *Debir*,[1622] signifying God's revealed words, i.e., God's oracles. Because Israel, however, let down its guard against false intellectualism by neglecting attention to God's Word, in time *Debir* reverted to a center for Babylonian teaching, inciting Amos the prophet to later call it, by a play on *Debir's* letters, *Baa-dabir*,[1623] meaning "nothingness."

§ 5.1.10
Inquisitional Torture –*vs*– Due Process

In proportion as men delight in the blood of battles, bullfights, and combats of gladiators, will they rack and torture those of whom they disapprove.[1624]

The common-law tradition has never included torture. To be sure, men have introduced torture into common-law countries, but thus far, it has never lasted there. In *Acts* 22:24–30, Luke provides clear contrast between the process of common law and the methods of civil law. The common-law tradition's engine of truth is cross-examination of a witness under oath, limited by the right to remain silent; by contrast, the civil-law tradition's method of extracting truth is the confessional using fear of punishment or terror that if the desired information is not forthcoming, it will be wrenched out by torture. For example, desiring to know what had incensed the mob against Paul the apostle, the Roman tribune bound Paul to *examine him by scourging*. Under Rome's civil law, scourging was not only a penalty for wrongdoing, but also the simplest method of information gathering or obtaining confession. In describing this and like events, Luke uses terms of legal art from the civil law.[1625]

[1622] Hebrew: דבר.

[1623] Hebrew: בּאדבר.

[1624] Strunk and White attribute the gist this statement to 2 HEBERT SPENSER, ESSAYS, SCIENTIFIC, POLITICAL, AND SPECULATIVE 15 (London, Williams & Norgate 1868). *See* WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 23 (1979). The writer has traced the gist of this oft-cited statement as far back as E. LITTELL, LITTELL'S LIVING AGE (Boston, Littell & Co. 1852), but has yet to find its author.

[1625] In recording uses of Rome's inquisitional devices, Luke uses the fitting term from Rome's civil law: *ανεταζω* (*anetakso*). A Greek verb of the intensive root form, the civil law used *anetakso* during the two centuries on either side of Christ's birth to signify inquisitional torture. Both the noun and the verb used in this passage refer to a thorough, straightforward, and extremely demanding examination, i.e., under torture. *See, e.g., Acts* 22:24–30. See also 2 *Maccabes* 7:37, wherein the writer uses the noun form (*ετασμος: etasmos*). *See* 4 KIRSOPP LAKE AND HENRY L. CADBURY, THE BEGINNINGS OF CHRISTIANITY (1933), *cited in* LINGUISTIC KEY TO THE GREEK NEW TESTAMENT 323 (Fritz Rienecker trans.,

Pilate scourged Jesus for this same reason and by the same civil-law principle: scourging was the civil law's device of efficiency for extracting information—albeit, in calloused disregard of God's image in the person scourged. Thus, in scourging Jesus, Pilate's purpose was not punishment. As did the Roman tribune that scourged Paul, Pilate knew that obtaining intelligence from one hated man by torture was simpler, quicker, and offered a better likelihood of achieving accuracy than attempting to gain the truth from an agitated mob, most of who were ignorant of why they were agitated to hatred. In addition, seeing that the members of the Sanhedrin were envious, dishonest, and unwilling to reveal the truth, Pilate concluded that torturing Jesus, would wring out something more than the Sanhedrin had revealed. Common law forbids such methods, preferring cross-examination in open court, under oath, by leading questions, and limited by the right to remain silent. By contrast, examination by extortion—extraction of information by threat of or infliction of discomfort—has been civil law's sanctioned method throughout history.

For example, Aquinas, being a scholastic, never devoted his mind to the discovery of unknown truth; he rather fixed his mind on the civil-law's goal: justification of the status quo and preservation of the existing powers of the state as total. This meant devotion to justification of the inquisitional methods of the civil law used to enforce the will of *the powers that be*; Aquinas practiced the conclusions of his reasoning with blind devotion. As inquisitor, "St. Thomas Aquinas demanded truthful answers to incriminating questions and advocated death for heretics . . . ." Innocent IV, Aquinas's acknowledged sovereign, "explicitly sanctioned the use of torture."[1626]

The encroachment of civil law's inquisitional torture remains a constant threat to liberty; the temptation to justify torture by rationalizing its necessity remains with us. Such justifying, however attractive it may be, is unfounded upon the Word of God and will work only evil. At this writing, debate boils in the media concerning a legislative exception for the Central Intelligence Agency's use of torture to obtain information in the name of necessity and expediency—the pleas of every infringement of human liberty. Some congressmen and an organization called Veterans for Common Sense, oppose it; but alas, their opposition is for pragmatic, not biblical, reasons: torture, they argue, will

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Cleon Rogers ed., Zondervan 1982), *originally published as* SPRACHLICHER SCHLUESSEL ZUM GRIECHISCHEN NEUEN TESTAMENT (Brunnen-Verlag, Gissen 1970).

[1626] LEVY, *supra* note 712, at 21 (1968).

fail to provide the intelligence sought.[1627] Pragmatism, however, is a weak argument at best because history reveals that terror and fear of torture's pain does sometimes extract desired intelligence: men threaten and use torture because, sometimes, it works. Even criminal-defense lawyers are painfully aware that threat of torture is an effective information-gathering tool.

The use of torture is characteristic of *total* war by the state: warfare without biblical restraint. Total war, however, is God's exclusive domain, carried out in His manner alone, for His purposes. Men are without authority to engage in it; further, even God's most extreme and intense warfare never includes torture as an intelligence-gathering option. God, however, requires that men and nations conduct all warfare consonant with the first principles of Scripture; war waged in disregard of God's directives will bring a curse. In warfare, as in all other endeavors, the end never justifies lawless means; both Scripture and common-law principles demand lawful process (means, method, and manner) as well as lawful reasons. Torture is absent among God's ordained methods to achieve victory. Warfare is solemn business in God's eyes: to be conducted only as Scripture allows, carried out in swift and decisive blows within God's bounds of means and purposes, and in fear and trembling before the LORD of hosts.[1628]

[1627] *See* Greg Simmons, *War Vet Group Calls For Ban on Torture* (visited 12 Nov. 2005) <www.foxnews.com>.

[1628] *See Psalm* 24:10. Hebrew: יהוה צבאות (*Yaweh Savaoth*), "the LORD of armies," *of* or *hosts* (seventeenth-century English, signifying "hostiles") is a common Old Testament concept carried into the Gospel records at the announcement of Christ's birth with the phrase *στρατιας ουρανιου* (*stratias ouraniou*): "Heaven's armies" or as early English translations rendering, "hosts of heaven." *See Luke* 2:13–14. The Greek *stratias* and its forms are martial, in and out of Scripture. *See, e.g.*, 2 *Corinthians* 10:4, "[T]he weapons of our *warfare* [*στρατειας: strateias*] are not carnal."; 1 *Timothy* 1:18, "that by them [the promises of Scripture] you might *war* [*στρατευη: strateuay*] the good *warfare [στρατειαν: strateian*]." The New Testament uses *strateias* in its martial sense as a metaphor of spiritual warfare.

According to *Luke* 2:13–14, God's armies attended the announcement of Christ's birth. "And suddenly there came with the messenger a multitudinous heavenly army praising God and saying: 'Glory in the highest to God, and upon earth, peace among men—in [God's] good pleasure." The presence of God's armies (*hosts* or hostile forces) brings immediate order or peace (*shalom* as order) according to God's—not man's—good pleasure. *Ευδοκιας* (*eudokias*), translated "good pleasure," is in the dative form in the earliest manuscripts, but not the latter ones. This same dative construction of this phrase is in the Dead Sea Scrolls' *Hymns of Thanksgiving*, signifying God's good pleasure, not men's. When God wants proper order between men (i.e., peace), He will have it. *Cited in* LINGUISTIC KEY TO THE GREEK NEW TESTAMENT 143(Fritz Rienecker trans., Cleon Rogers ed., Zondervan 1982), *originally published as* SPRACHLICHER SCHLUESSEL ZUM GRIECHISCHEN NEUEN TESTAMENT (Brunnen-Verlag, Gissen 1970).

History loudly speaks: a government claiming the power or right to torture—given ample time—will turn torture upon its own people in the name of expediency, necessity, or even national security. Thus, if Americans entrust their government with the tool of torture in war, in time the state will turn this lawless tool upon Americans.[1629] Moreover, torture is terrorism because it uses pain or fear (terror) of pain to gain compliance of those already under physical control.

Scripture and common law provide good reason to oppose torture: since every member of Adam's race has originated from God's perfect imagination, exists in His image, by His Word, and accordingly, is a glimpse of His perfect mind, each person carries God's dignity[1630] and, therefore, requires respect fitting that dignity. In short, God requires absolute respect for His image in man. Advocates of torture still object, arguing that since terrorists refuse to respect the Creator's dignity in men, we need respect neither the terrorists' God-given dignity nor the dignity of one that *possibly* has information concerning terrorists. Nonetheless, God has never conditioned His requirement to respect the dignity He has placed in each member of Adam's race upon our enemy's respect of our God-given dignity.

In addition, God's Word extends this principle by forbidding those acts that tempt a person to consider another person inferior, rather,

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Therefore, according to *Luke* 2:13–14, God's order, or *peace*, will occur among men only as God orders proper relationship between Himself and men, and among men: God through Christ brings order between God and man, and between man and man. *See Proverbs* 16:7, *Ephesians* 2:13–16. The practical character of God's order is most fundamentally set forth in the Ten Commandments. The Commandments first address the ordered relationship between God and man, and then between man and man. Christ further expounds as God's ordering of relationships, according to the orders of the God of all order. *See Matthew* 5–7,The practical definition of God's love is to keep His commandments. *See* 1 *John* 5:3. "Love," says Paul, "is the fulfillment of the law." *Galatians* 13:10.

[1629] The tendency of those in government to treat their countrymen as they deal with forgein enemies will not surprise the one amply familiar with history. Since the present American war on terror began, federal judges in open court and the government in their documents have labeled Americans wholly unrelated to terrorism with the title *Terrorist*, excusing their willful disregard of the rights of falsely accused defendants whose behavior is unrelated to terror but of whose views and activity government disapproves. Once labeled as a terrorist, government deems a defendant an enemy combatant, and certain legislation, such as the Antiterrorism and Effective Death Penalty Act of 1996, is said to apply, depriving him of enjoyment of his constitutional rights.

[1630] Scripture declares of man as God's creature: "You have caused man to lack a little *from the Godhead* [comparative מאלהים: *'elohim*], then with dignity and majesty you have *crowned* [עטר: *'atar*] him. You have caused him to rule over the works of your hands, the entirety [of which] has been placed under his feet." *Psalm* 8:5–6.

requiring that each person esteem all others better than himself.[1631] Thus, even where God authorizes corporal penalties for wrong doing, Scripture imposes restrictions on the one delivering those penalties so that the wrongdoer's *brother*—the Hebrew term signifies any friend, neighbor, or relative—is never tempted to consider the man suffering penalty inferior, lacking dignity.[1632]

Scripture further weakens incentive for torture by forbidding conviction of any person of a crime solely upon his own confession: law demands at least two witnesses—but never allows more than three—to establish each fact offered in support of conviction.[1633] By thus forbidding

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[1631] *See Philippians* 2:3. *Υπερεχοντας* (*huperekontas*) admits of no understanding other than *superior*, *excel*, or "better than."

[1632] *See Deuteronomy* 25:3. In this verse, נקלה (*neqala*: the simple passive or Niphal stem of קלה, *nalah*), the Hebrew term translated "to be vile" or "despised," signifies the debasement of a convicted man's worth in the eyes of others by violating ordained limits of corporal punishment. Respecting God's people, all of God's commands carry dignity, lend dignity to all concerned when obeyed, and tend to dignify all else that they touch. The Old Testament's authors use the root from which *neqala* forms, only where one's dishonor in the eyes of his fellow man is caused by others and not by one's self. Therefore, it only occurs in either the Niphal stem (simple passive: "he was dishonored") or the Hophal stem (causative passive: "he was caused to be dishonorable").

Deuteronomy 25:3 also reveals principles applicable to a right understanding of the Constitution's bar against cruel and unusual punishment. *See* U.S. CONST. amend. VIII. In cases of doubt, one must compel government to err on the side of individual dignity because each individual carries God's dignity as the product of God's holy imagination, i.e., God's image. To carry punishment too far brings God's consequences. To violate another person's dignity is to violate God's dignity. The principle *eye for eye* and *tooth for tooth* is a limitation on the courts: the sentence must never exceed the magnitude of the wrong. *See Exodus* 21:22, *Leviticus* 24:20, *Deuteronomy* 19:21, *Matthew* 5:38. Even though capital punishment follows this principle (*Exodus* 21:23: "you shall give life for life"), prohibitions against cruel and unusual punishment limit it.

[1633] *See* 2 *Corinthians* 13:1, *Matthew* 18:16. '*Rayma* (*'ρημα*), the Greek term used in these verses to signify unproven accusations of facts, is a *saying*. Whether '*rayma* refers to a true or false accusations depends on its context. In the contexts surrounding both of the foregoing verses, *'rayma* denotes mere accusation unconnected to the accuser's mental conviction: though made in a formal judicial setting, yet incomplete and unproven. '*Rayma* is distinguished from the Greek's *logos* (*λογος*: often translated "word" or "matter"), which highlights the complete, proven, inward, conceptual, real, and substantial knowledge of one's mind. A '*rayma* is man's indictment based on probable cause at best, or reasonable suspicion at the least. On he other hand, a *logos* is God's judgment founded on the truth of evidence persuading beyond any reasonable doubt in the eyes of men.

In summary *logos* denotes perfected speech: the whole and complete revelation of proven substance; the *logos* is inerrant. '*Rayma*, on the other hand, denotes a word, phrase, paragraph, or pericope extracted from a longer *collection* of speech. '*Rayma* denotes a saying without certifying its truth or falsity, or its correct understanding because it is contemplated out of its context. Therefore, the *logos* is reliable, while a '*rayma* is unreliable because it remains unsubstantiated and unproven by good evidence. *See also Numbers* 35:30, *Deuteronomy* 17:6. For example, a '*rayma* is that which God has spoken and therefore is worthy of trust that results in saving faith, but yet to be proven in the

conviction solely upon confession of the accused, God weakens incentive for torture in order to obtain that confession. In addition, Scripture forbids conviction on confession alone because confession is untrustworthy:

> [Confessions are] the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature, of being disproved by other negative evidence. To which it may be added, that it is easy to be forged, and the most difficult to guard against. *An unprincipled demagogue, or corrupt courtier, might otherwise hold the lives of the purest patriots in his hands . . . .*[1634]

History shows that guilt by confession and the confessional has proven unreliable at best and a tool of tyrants, encouraging torture at worst. As are all safeguards of law, the evidentiary rule disregarding guilt by confession alone is in place because man—unlike God—is less than omniscient.

God has given to America, as well as other countries, the power of the sword to execute His terminal injunction against terrorists. Nevertheless, in the course of carrying out this grisly duty, neither the God of nature nor nature's common law authorizes abuse of any man's dignity. Eternal law demands that men carry out the consequences of lawlessness, regardless of the level of severity demanded, in respectful dignity of God's image borne in every member of Adam's race. By responding to terrorism with terrorism, America will demean God's image in men in either of two ways or both: by neglecting to execute the penalties against terrorists—thereby dealing with these men as less than human, i.e., as though they were without responsibility—; by executing judgment against them in a manner disrespectful of God's image in them, i.e., in vengeance. The consequence to the terrorist is death. In certain cases,

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experience of individual obedience. "*The* faith [articular, viz., saving faith]," says Paul, "is from hearing, and the [that] hearing through a '*rayma* of God." *Romans* 10:17.

[1634] STORY, *supra* note 89, at 671 (emphasis added). The writer draws this quote from the context of Justice Story's commentary concerning the Constitution's requirements for conviction of treason. In cases of treason, the Constitution allows conviction by confession only if made in open court. *See* U.S. CONST. art. III, § 3. This requirement discourages temptations of law enforcement to use methods of inquisition, such as torture, to extract a confession.

taking the life of the lawless is a duty, but to abuse God's dignity in that lawless man in the process of executing this duty is an abuse; God has clothed man with authority to execute His judgment only according to the manner of His directives, which excludes torture.

Moreover, in this day of man's administration of law and government, God authorizes governments to use law against lawless behavior, but never against an individual's conscience. *Romans* 13:3–4 reveals that earthly governments are meant to be a terror to evil doers, not to evil thinkers: not to those merely suspected of holding, in their consciences, thoughts and information undesirable, distasteful to the state, or even lawless, unless coupled with unlawful action.

Romans 13:1–7 confers criminal jurisdiction over evil behavior, while reserving criminal jurisdiction over men's consciences and thoughts to the only One knowing the thoughts and intents of the heart, who will execute final judgment in the DAY of the LORD. "The heart [Hebrew: *leb*,[1635] signifying the desires, intents, thoughts, and intellect of man]," declares the LORD, "is deceitful above all things, and incurably sick," and then He asks rhetorically, "[W]ho can know it?"[1636] The answer is obvious: God alone. The LORD then declares His exclusive right to judge men's individual consciences. "I, the LORD, am searching the deep yearnings, testing the affections . . . ."[1637] The methods of civil law, such as inquisition and torture, usurp these sovereign prerogatives of God.

§ 5.1.10.1
The Inquisitor's Goal: Confession

The Babylonian theory of the confessional depends upon secrecy, seduction, fear, and intimidation. The confessional enables the state, through the manipulations of priestcraft, to usurp God's exclusive lordship over the conscience of the defenseless. The common law of evidence views confession as the weakest of evidence, especially when elicited by direct accusation of a police officer, prosecutor, or other person carrying the colors of authority. Experience has shown that the power of accusation will cause the human, in his frailty, to doubt even his clear innocence—thus, the power of Satan, the great accuser.

[1635] Hebrew: לב.
[1636] *Jeremiah* 17:9.
[1637] *Jeremiah* 17:10.

A tool of priestcraft from ancient Babylon, the state's use of the confessional to keep control of men has scattered about the globe, wherever Babylonianism is found.[1638] Whether in the ceremony of religion or the realm of the state, the effectiveness of the confessional depends upon inducement and magnification of fear: in the ceremony of religion, fear of eternal damnation; in the realm of the state, fear of emotional or bodily pain. In either case, the inducer of confession seeks to extract the words he wants.

The methods of the confessional—police interrogation, intimidation, creation of fear, discomfort, and emotional distraughtness, followed by promises of relief—and confessional evidence are abhorrent to the common-law tradition. At the inquisition of Jesus, the Jewish elders, chief priests, and scribes in council, in violation of divine law and Hebrew custom, closed discovery declaring: "What need do we have of further witnesses? For we have heard [confession] from his mouth."[1639] Their conclusion was further unlawful because Scripture requires a minimum of two witnesses to establish any material fact. A man's confession, standing alone, falls short of this standard.

Vestiges of the civil law's confessional have carried into American law by the seduction and intimidation of police interrogations and into American courts by devices of secrecy, such as the prosecutor's sealed documents and ex parte hearings. Conducted by a single party before a judge (the prosecutor) and without notice to an adverse party, common law allows ex parte hearings only in extraordinary circumstances, where regular process of law is unable to provide justice. As a rule, however, the common-law tradition bars ex parte proceedings because secret hearings forfeit the effectiveness of adversarial conflict to expose truth.

Prosecutors abuse the ex parte hearing in American federal courts, where some judges encourage secret proceedings and sealing of documents in callous disregard of the common-law and constitutional right of the parties and the public to open pretrial proceedings and public

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[1638] See, *e.g.*, P. TURNER & C.R. COULTER, DICTIONARY OF ANCIENT DEITIES 470 (2001), wherein the authors dicuss one of many examples of the Aztec priesthood of Tlazolteoti (translated, *lady of filth*). She and her priestesses demanded, and received, every person's confession, claimed to absorb their sin, rode through the air on a broomstick in a peaked hat, and forced young girls "into prostitution in the barracks of trainee warriors, only to be ceremonially killed once their career had reached an end, their bodies dumped as polluted refuge into the marshes of Lake Texcoco," near present day Mexico City. THE ILLUSTRATED ANTHOLOGY OF WORLD MYTH & STORYTELLING 550–51, 577 (Scott C. Littleton ed., 2002).

[1639] *Luke* 22:71.

trial. The right to a public trial includes pretrial proceedings and is co-extensive with the right to freedom of speech and freedom of the press.

Though false systems of religion, law, and government claim authority for their inquisitional powers; though men, made fearful, believe these powers possible; inquisition usurps God's prerogative.[1640] Jesus Christ declared that though men are able to destroy a person's body, only God holds jurisdiction and power of destruction over all three aspects of a person's being: body, soul, and spirit. It is false religion's lie, and earthly government's usurpation, that seeks violation of one's freedom of conscience.[1641] Scripture stresses one's responsibility to discern when one ought to keep one's silence (holding one's peace) as much as the responsibility to discern when to speak. The one that reveals his conscience to all others, without discernment, Scripture calls אויל (*'ewili*: foolish). "The *'ewil* [foolish one] identifies himself as soon as he opens his mouth."[1642] The common-law tradition protects freedom of conscience through two means: the right to remain silent and the right of the confessor to muzzle the priest to whom he has confided in confession, using the priest-pentinent privilage.

§ 5.1.10.2
The Presumption of Innocence

In the common-law tradition, the accused in a crimnal case is innocent in the eyes of the law until proven guilty beyond a reasonable doubt. The law will not torture the one it presumes innocent. Some teach that the civil law holds the accused innocent until proven guilty, and that those through the centuries claiming to the contrary—that civil law presumes guilt and requires the accused to prove his innocence—arose from the misunderstanding of the second-century reorganization of Roman civil procedure under the Aebutian Law.

The statute establishing the Roman *formula* also established the Aebutian Law: a writing a *praetor* delivers to a *judex* (judge), directing, among other possibilities, either condemnation or acquittal, whichever the praetor's leaning. Of the twelve possible instructive clauses of this document, it titled its clause directing condemnation, *condemnatio*.

[1640] *See Matthew* 10:28.

[1641] See generally §§ 4.8–4.8.2 of this book (discussing the common-law right to remain silent).

[1642] 1 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 19. *See, e.g., Proverbs* 10:14.

"[P]robably this phrasing . . . inspired the erroneous notion that Roman law and its derived systems presume a defendant guilty until proven innocent."[1643]

Not all, however, share the foregoing opinion of Johnson, Coleman-Norton, and Bourne. The traditional common law stresses its distinction from the civil law on this point. Moreover, in light of the difficulty the common law has had in keeping the innocence of the accused in the minds of judges and jurors, it is no surprise that civil-law systems have had less success. Nonetheless, the forensic innocence of the accused remains a pillar of the common-law mindset. Civil-law notions, however, continue their creep into common-law countries and are seen in the two different views of the accused now taken by common lawyers: some holding that the accused *is* innocent unless convicted; others claiming that this presumption only requires the court to hold a mere legal, rebutttable presumption of the innocence of the accused.

To be sure, common law's presumption of innocence is rebuttable, but if it is no more than a fiction to accommodate due process, the government, for all other purposes, can deal with the accused as though convicted already. For example, the writer recently read the comments of a federal judge, made during the arraignment and setting bail of the accused: "In view of the heinous crimes you have done, I deny bail." The law allows plenty of other reasons for denying bail; a judge's belief of guilt before completion of the trial is an unlawful reason.

The presumption of innocence is under attack in common-law countries and, as a practical matter, is non-existent in civil-law states. In Sweden, for example, by indictment, the state presumes that the accused is guilty. Consequently, as a practical matter, before and during his inquisition, he stands convicted in fact; if he fails to overcome the burden of proving his innocence (proving the negative), the judge will sentence him. In common-law countries, on the other hand, the law never requires the accused to prove his innocence because he *is* innocent as he stands trial and bears no burden to prove any thing.

[1643] 2 ALLAN CHESTER JOHNSON, PAUL ROBINSON COLEMAN-NORTON, FRANK CARD BOURNE, CORPUS JURIS ROMAI 263 (1961).

§ 5.1.10.3
Reasonable Doubt of Guilt

In a criminal case, the innocence of the accused is a fact in law; consequently, law bars the court from subjecting the innocence of the accused to any test. Rather, it is proof of guilt that the Jury must put to the test. The test of the Jury's verdict is never its certainty of one's innocence, but rather, its doubt of one's guilt. Moreover, a guilty verdict requires certainty of guilt beyond any reasonable doubt. The reasonable doubt standard has two parts. *First*, does the Jury have a doubt that the accused is guilty? *Second*, if so, is that doubt reasonable? If that doubt is reasonable, then the verdict must be for innocence. But what qualifies as reasonable? Lest the government be allowed to take life, liberty, or property from the innocent-accused (innocent until proven guilty), the answer must be clear.

As to whether the juror has a doubt, he should ask himself if a guilty verdict questionable? Does he hesitate to bring in a guilty verdict? If so, what is the cause of hesitation? Once he has identifird the cause, he must ask if that cause reasonable? Put another way—is the reason for hesitation reasonable? The juror must, however, be wary; reasonableness does not always equal logical.[1644] Determining if a doubt is reasonable is never a bright-line test of logic. Though all hesitations to convict must be at least reasonable, the law never requires doubt of guilt be logical. Though the juror can be sure an accused is innocent by having a doubt of his guilt; but he can never be sure an accused is guilty by being doubtful of his innocence. Thus, a guilty verdict is good only where the Jury have no doubt of guilt that is *reasonable*. One's conclusion can be logical, but unreasonable if one bases one's logic on false presumption, i.e., false appearance of fact. One's verdict of innocence never demands one's logical certainty of innocence. Logical doubt is always reasonable; logical certainty of guilt may or may not be reasonable. One's certainty of guilt must always be reasonable.

A clear understanding of reasonable doubt is indispensable to justice

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[1644] In the common-law tradition, *reason* is the proper use of reasoning power, but *reasonableness* is more often a word of assessment, signifying fairness according to the common sense of a matter at hand. Thus, the courts of appeal have frowned upon defining reasonable doubt as a doubt for which reasons can be given. PATRICK DEVLIN, THE JUDGE 134 (1979). At bottom, for a doubt to be reasonable, on must have based it upon some fact discerned and pondered. Only that conclusion arising from a fact is reasonable. "A *fact*," says Wigmore, "is any act or condition of things assumed" to have happened or existed. JOHN H. WIGMORE, A STUDENTS' TEXTBOOK FOR THE LAW OF EVIDENCE 7 (1935).

in common-law criminal trials, but its understanding eludes jurors:

> [T]wenty-three percent of instructed jury members believed that when the weight of circumstantial evidence was equally balanced between guilt and innocence the defendant should be convicted. Additionally, only fifty percent of the jurors understood that the defendant did not have to present any evidence of his innocence; ten percent were uncertain as to what the presumption of innocence meant; and two percent believed that the burden of proof of innocence lay with the defendant. This data led the researchers to conclude that the meaning of 'burden of proof,' 'preponderance of the evidence,' and 'reasonable doubt' should be explained to the Jury.[1645]

The following excerpt from a model jury instruction is available for use in the federal courts at the discretion of the judge:

> Indeed, the defendant in a criminal case, the law presumes innocent. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant. Thus the defendant, although accused, begins the trial with a "clean slate"—with no evidence against him . . . the presumption of innocence alone is sufficient to acquit a defendant, unless you the jurors are satisfied beyond a reasonable doubt of the defendant's guilt . . . The defendant has pled "not guilty" to each of the charges in the indictment. These pleas put in issue each of the elements of the offenses, as described in these Instructions, and the government has the burden of establishing each of these elements by proof beyond a reasonable doubt . . . Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. The Jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is

[1645] 904 COLUM. L. REV. 1716, 1723.

> always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.
>
> So if you, after careful and impartial consideration of all the evidence in the case, have a reasonable doubt that the defendant is guilty of the charge, you must acquit. If you view the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—you should, of course, adopt the conclusion of innocence.[1646]

From America's inception, the reasonable-doubt standard for criminal cases has been an established common-law standard. Not until the 1970,[1647] however, did the Supreme Court accord constitutional dignity to the reasonable-doubt standard. Nevertheless, jurors often fail to distinguish proof *by a preponderance of the evidence* from proof *beyond a reasonable doubt*. Therefore, for a defendant's acquittal or conviction to have satisfied principles of due process,[1648] the court must give to those called to sit as jurors, simple and clear instructions concerning *reasonable doubt*. Even if a juror believes the accused is likely guilty, but retains a doubt that is reasonable in light of the facts as he understands them, the law demands that he insist upon a verdict of innocence.[1649]

[1646] Pattern Jury Instruction 1.06, United States Fifth Circuit (West 1990); 1, E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.10 (4th ed. 1992). *See generally* 55 B.U.L. Rev. 507 (1975) (providing the history of guilt beyond reasonable doubt as a standard of proof in criminal cases).

[1647] *See In re Winship* 397 U.S. 358 (1970).

[1648] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1649] In the common-law tradition, proof of guilt beyond a reasonable doubt means, in addition, that the government must prove beyond a reasonable doubt, separately and individually, that *each element* of the crime alleged is true. Judges sometimes fail to elucidate this powerful aspect of common law to the Jury; when they do elucidate it, jurors sometimes fail to understand it. For example, at common law, burglary has occurred only if each the following elements are proven: (1) a person (2) over eighteen years of age (3) breaks (4) and enters (5) the dwelling of another (6) between sundown and sunup (7) with the intent to do larceny or a felony therein. In order to convict, the government must prove each element of this definition, separately and individually, beyond a reasonable doubt. This requirement includes whether or not the accused is over eighteen years of age, even if he looks eighty; judicial notice falls short of the standard. The United States Supreme Court

§ 5.1.11
Civil Law's Weapons:
Fear & False Security

Civil-law doctrines rest upon fundamental false notions of government, authority, and power. Thus, the foundations of the civil law being false, the entire tradition is unstable and in constant danger of toppling. Thus, the legislator in civil-law countries, knowing that those foundations are shaky, builds processes and doctrines that keep all questions of law away from the civil-law's vulnerable base by two means: *first*, he tries to keep all disputes concerning law wrapped up in the minutia of administrative regulation; *second*, if that fails, he seeks out and prosecutes, in disregard of personal rights and truth, any who threaten, by arguing first principles, to expose the foundation's falsity. In a word, the civil law's two weapons of self-preservation are administrative law and fear produced by the threat of criminal prosecution—even though false and done in prosecutorial misconduct.

The civil law Code, though unstable, is quick and easy to establish. Requiring only a few powerful political figures to implement its power, it beckons, claiming to remove personal responsibility for discernment and behavior, offering a total government that people can see, and promising security, peace, and safety without personal discipline. It is utopian and appeals to the desperation of frail humanity to quell fear. Once dependency entraps and enslaves, escape is more than difficult.

Thus, in scholasticism, the means justifies the ends: entrapment, conspiracy, forcing of answers under oath, deceit, discouragement, intimidation, and torture are the wicked offspring of the civil law's result-focused tradition of inquisition. Such devices are without warrant from Scripture and contrary to nature but, nonetheless, have also crept into American law and government to induce fear in any that threaten to expose wrong in government. Experience shows that if courts overlook such lawless means against one person, courts will justify the same methods against all persons, law-abiding and lawless, or a minority whose viewpoint the dominant faction rejects. Nevertheless, some argue that courts must be willing to suspend individual rights; otherwise,

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recently re-established this common-law principle in Blakely v. Washington, 542 U.S. 296 (S.Ct. 2004). See generally § 5.1.10.3 of this book (defining *guilt beyond a reasonable doubt*: the common-law standard of proof in criminal trials).

dangerous criminals will remain at liberty to harm others—civil law's argument of necessity.

History, however, shows that any suspension of individual rights and freedoms under the banner of necessity induces fear and translates into arbitrary suspension of rights and freedoms of all. Freedom acknowledges that each person remains ultimately responsible for his safety and that of his family. Lack of freedom, however, is more dangerous: where the state claims all responsibility to exercise the protective function and bars every other from protecting his rights and the rights of those within his reach of responsibility, the state and other powerful parties—as with all monopolies—will abuse people.

Contrary to claims otherwise, lawmen are under no legal duty to risk their lives and limbs for anyone. Rather, law-enforcement officers are under a duty to enforce the law: a sometimes-dangerous duty but includes no enforceable obligation to risk their lives and limbs for others. Though many peace officers have done so, such laudable acts still leave unaltered the general rule that lawmen are not liable for failing to do so. Thus, all general claims of the state's willingness to protect people are empty, being unsupported by any real duty enforceable against the state. That the individual, the family, and the neighborhood remain responsible for their own safety is the unavoidable conclusion of law, reality, and history—notwithstanding adamant claims, clamoring to the contrary; freedom comes only with this individual responsibility of protection of one's self, family, and neighbors. That the benefits of freedom, however, far outweigh such burdens is the teaching of Scripture, common law, and history.

Protecting the due-process rights of the one accused protects the rights of all. God has made every individual in His image and dignity. God having bestowed the individual's dignity and rights, the state (i.e., men) is without authority, or even the power, to separate his dignity and rights from him: one's dignity and rights are inalienable. Though the state frustrates a person's enjoyment of his rights and demeans his dignity in the eyes of others, the state is powerless to separate that which the Creator has inextricably bound into the being of that person.[1650]

[1650] Scripture declares of God: "You have caused man to lack a little *from the Godhead* [comparative מאלהים: *ma'elohim*], then with dignity and majesty you have *crowned* [עטר: *'atar*] him. You have caused him to rule over the works of your hands, the entirety [of which] has been placed under his feet." *Psalm* 8:5–6. "I felt like a monarch," wrote Crockett, "yet thought like a man, as I thanked the Great Giver, and worshiped his plan."

Any person's rights are only as secure as are the rights of any other. Sir John Fortescue, comparing common-law procedure with the civil law on this point, said, "I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly." Later, in America, Puritan minister Cotton Mather counseled those concerned with the Salem witchcraft trials, saying it were better that ten suspected witches should escape than that one innocent person should be condemned. Such is the spirit of Scripture and the common-law.

Church historian Ken Connolly once remarked concerning freedom of worship and the Albigenses heresy, "The price of freedom is the defense of idiots." Connolly used the word *idiot* in its etymological and not crass sense; in principle, the Supreme Court agrees: "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for *crackpots*."[1651] Rights and freedoms applied selectively are neither.

§ 5.2
Civil Law's Wide Appeal & Reception

When emperor Justinian legislated his compiled Code on 16 December 533, he held power only over a small part of Asia Minor and surrounding territories. Nevertheless, Justinian's *Corpus Juris Civilis*—the civil law—has now spread over the globe, by and large unaltered in its various forms and fundamental principles. The civil-law tradition is more pervasive throughout the world's nations than is the common-law tradition for four reasons.

First, because the civil-law tradition forbids following previous court decisions, the civil lawyer and tribunals, in order to ply their trade, need only a few statute books, that is the Code. On the other hand, the common-law tradition calls for a tailored judicial approach demanding not only wider research, but also finer distinctions. Therefore, in times past, in order to implement the common law in every place in a country, every common lawyer needed at his fingertips volumes of appellate case opinions because every kindred appellate finding within the jurisdiction of the case at bar was (and still is) needful to distill the applicable principle and rules of application.

[1651] Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 513 (1969) (Fortas, J.) (emphasis added).

Nowadays, however, the personal computer with Internet is making common-law practice doable at any location, worldwide. Case opinion authority is available on line. Personal computers can become to those in emerging third-world countries what Blackstone's *Commentaries on the Common Law* was to the American frontier lawyer. Though not all the volumes of authoritative case opinions necessary to the frontier lawyer's practice were available, Blackstone had distilled the principles of the common law down to four obtainable volumes. With these in hand, drawing first principles from Blackstone's *Commentaries*, lawyers on America's frontier applied them to meet new circumstances.

In the same way, the personal computer, through the Internet, provides easy access to appellate case authority. Civil law, therefore, will no longer hold a decided advantage over common law in remote areas. American law schools increasingly provide access to their libraries *via* the Internet; others offer seminars that instruct the curious how to do legal research on the Internet without cost.

Second, the civil-law tradition demands no organized electorate. Only a few powerful personalities and a copy of the Code are necessary to emplace, prime, and maintain civil law's centralizing of law and government. Simply put, the civil-law state is of a single will; its Code is the imperial state's commands, and the state, including its courts, enforces those commands. By contrast, that upon which the common-law tradition thrives must develop over time: conflict operating according to pre-established conventions and rules such as ideals of fair play; separation and independence of the executive, legislative, and judicial powers; and the finality of the Jury's verdict.

Third, mankind, in his natural state, leans toward the civil-law tradition of government and it draws him. Estranged from his Creator by sin and not knowing the true God, civil law's offer of utopian fantasy attracts him: a visible state of claimed total power, claiming benevolence: i.e., willing and able to secure his safety and provide all his needs. To be sure, by his same natural yearnings, pagan man has recognized—as did the first Romans and the ancient Anglo-Saxon tribes—common-law kinds of law and has formed common-law kinds of government. Thus, by nature,[1652] unregenerate men have discovered the forms of government that allow the best opportunity to protect life, liberty, and property. Nevertheless, by his natural abilities alone, man lacks the native power to

[1652] By his ψυκικος (*tsukikos*: viz., his physical nature alone) man can discern right from wrong. See generally § 5.1.2 of this book (discussing *Romans* 2:14–15 and man's natural capability to discern law).

persevere in keeping such ideals, falling instead for the state's false promises of cheap security. Civil-law government entices the individual to relegate to the state his personal and non-delegable duty to learn to govern himself. Having done so, even where he institutes common-law forms of government, that government will slouch toward civil-law notions and fall under their control—absent divine providence.[1653]

Fourth, because both the eastern and western branches of the Roman imperial Church use civil law in the form of the canon law, the world perceives civil law to be a Christian law. Consequently, societies over which Roman religious doctrines and canon law hold sway, embrace civil law and government. The canon law of the Roman Church is civil law with ecclesiastic variations.[1654] Because Roman religious doctrine, canon law, and civil law are of the same substance and fundamental consistency, to be at ease with Roman religious doctrine and canon law is to be at ease with Roman civil law. "[B]ecause the law of the Church was founded on Roman law, logic dictates that the ecclesiasts would turn to the Roman law for guidance."[1655] Likewise, civil-law governments continue to look to the canon law of Roman Church for vindication of their actions.

As the old Roman Empire weakened and waned, Constantine and then Gregory tried to revitalize it by assimilating and amalgamating loosely expressed teachings of Christianity with the paganism of Rome's civil-law government. The church at Rome, wedded to and seduced into dependency upon the Roman state, looked to Rome's civil law to extend Rome's power; since her identity was now one with the Roman state, the Church saw that furthering the state's power furthered her own. Consequently, as did the march of Rome's legions, the march of Rome's religion has borne in its bosom the civil law. In any particular nation, the critical mass of that nation's religious scruples, more than any other matter, will dictate not only her form of government, but also the

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[1653] Experience show that once a people institute the forms and principles of common-law government, these will weaken and crumble in wrack and ruin unless a critical mass of persons among that people is under the compelling influence of the Holy Spirit. Only then will individuals be motivated toward consistent and contagious audacious activity aimed at filling these proper forms with divine truth: the only life-giving substance able to quicken dry (marrowless) bones. The only cure for death is life; the only source of life is the Holy Spirit. Our common law forms and manner of government will stand upright and walk with us only if filled with divine substance, namely, the principles of God's Word.

[1654] *See* 70 TUL. L. REV. 1148–49, *citing* 10 NOTRE DAME L. REV. 357, 365–66 (1935).

[1655] 2 WILLIAM BLACKSTONE, COMMENTARIES 328 [n.d.], *quoted in* CHARLES E. ROUNDS, JR., LORING A TRUSTEE'S HANDBOOK 585 (2003).

substance her law.[1656] Thus, the law of the imperial church has translated into the civil law of nations.

Fifth, because the civil-law tradition has always been, and remains, the product of universities, legal scholars, and abstract reasoning smelling of library dust, it bears an air of unhurried relaxation, organization, intellectual dignity, prestige, and superiority, of which civil lawyers are not bashful: civil law appeals to man's intellectual vanity. The common-law tradition, on the other hand, has always been, and remains, an arduous and moment by moment rendering toward truth through a process of conflict among jurors, judges, lawyers, witnesses, and the concrete experiences of individuals struggling over life, liberty, and property. Consequently, its processes bring an atmosphere of rivalry accelerating toward a showdown compressed into the intensity of a public trial, disorganized by the passions of the struggle and often lacking appearances of intellectual dignity, but bent on vindicating individual liberty and dignity. In contrast with the civil-law tradition, the common law in its practice is not always pretty.

The Roman civil-law tradition has had many lives, in many times, and among many peoples: the resilience of the canon law, the rise of the commercial law, and the engulfing aggression of international organizations all testify that the civil-law tradition is alive and active. On the other hand, the common-law countries, in the providence of God, have repelled decisive domination by civil law's humanism operating under the seducing banners of rationalism and scholasticism.

The civil lawyer, seeing the foregoing differences between his tradition and the common-law tradition, concludes the common law's inferiority, which translates into his attitude of superiority. Thus, the civil lawyer justifies the civil law's widespread entrenchment and ever-reaching domination, in spite of its utopian fantasies and its resulting atrocities:

> We in the common law world are not accustomed to thinking in . . . [civil-law] terms . . . It should be added that many people believe the civil law to be culturally superior to

[1656] America's form of government and substance of law has resulted from a critical mass of her religious convictions, the fruit of truth's long and continuous struggle. The infusion of God's Word, belighted by His Spirit, has provided the form and substance of good law and government, first in the Church and then the nation. *See generally* DOUGLAS F. KELLY, THE EMERGENCE OF LIBERTY IN THE MODERN WORLD: THE INFLUENCE OF CALVIN ON FIVE GOVERNMENTS FROM THE 16TH THROUGH THE 18TH CENTURIES (1992) (examining the role of Christianity in the emergence of political liberty since the Reformation).

> the common law, which seems to them to be relatively crude and unorganized . . . [I]t is to the point that many people think that [the] . . . [civil-law] legal system is superior to ours. That attitude itself has become part of the civil-law tradition.
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> Hence a lawyer from a relatively undeveloped nation in Central America may be convinced that his legal system is measurably superior to that of the United States or Canada . . . He may be inclined to patronize a common lawyer. He will recognize our more advanced economic development, and he may envy our standard of living. But he will find compensatory comfort in thinking of our legal system as undeveloped and of *common lawyers as relatively uncultured people.*[1657]

Such has always been the attitude of the civilian: because his law and government from ancient times has been urban or *civil*, he says—as did the Greco-Roman humanists before him—that the civil-law nations are civilized and the rest of the world is uncivilized or *barbaric*.[1658]

§ 5.2.1
Civil Law's Semi-Deified State

When Hitler says that "the state dominates the nation because it alone represents it," he is only putting into loose popular language the formula of Hegel, that "the state is the general substance, whereof individuals are but accidents." Or, again, when Mussolini says, "Everything for the state; nothing outside the state; nothing against the state," he is merely vulgarizing the doctrine of Fichte, that "the state is the superior power, ultimate beyond appeal, absolutely independent.[1659]

[1657] MERRYMAN, *supra* note 82, at 3 (emphasis added). *Elitism* is a fundamental component of the civil-law tradition. "Professor Lèvy-Ullmann, a continental jurist obviously trained to revere the official written text, describes [the common law] in England before the time of Edward I. . . . He does not hesitate to use the word 'barbarism'." ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 203–04 (Liberty Fund 1974) (1966). After making this observation, Lèvy-Ullmann ignores the atrocities of Rome's empire and like enormities rationalized by Rome's law using its scholastic methods: viz., Roman inquisitions, Nazism, and communism.

[1658] The attitude of urban superiority traces beyond the Greek city-states to the founding of Babylon. See generally §§ 2.1–2.3, 2.4 of this book (discussing the founding of Babylonian law and government, the spread of its influence, and its suitability to urban administration). The *barbarian* has always meant the un-citified.

[1659] ALBERT J. NOCK, OUR ENEMY THE STATE (reprint 1983) (1935).

The civil-law tradition tends toward concentrated power and diminished due process, demanding quick response to the orders of central command. Therefore, it serves the purposes of organizations and circumstances necessitating martial and maritime law: military units, ships at sea,[1660] and especially the ambitions of military conquest. Civil-law principles are also well fitted to administrative and municipal bureaucracies, socialist, communist and communal societies governed by central party control. Aimed more at government efficiency than at individual freedom and protection of private relationships, governments of thickly populated urban areas, desiring expediency, use civil-law principles to cut off due process in the name of efficiency, but at the expense of individual rights and relationships.

Civil law demands that the individual surrender his rights—and the creative productivity that exercise of these rights engenders—to the convenience of government administrators. To easily obtain such voluntary surrender, those that govern tell the individual that waiver of his rights is in the best interest of society and to insist upon his rights is selfish and *uncooperative*. Civil law's salient trend is all-embracing (total) state regulation. The civil-law tradition is imperial: demanding obedience, its precepts enabled Rome to hold the known world under martial subjection, even though its foundations were pagan. Nevertheless, the civil law presents an ostensibly uniform and predictable order that attracts humanity's longing for a feeling that the future is secure.

Humankind is inherently religious; from the settling of Babylon to the incipient days of Rome's conquests, the religion of the Babylonian priesthood propagated and inextricably wedded itself to civil-law ideals of state. Thus, religion and state grew in symbiotic relationship, both

[1660] Martial law is a necessary ingredient of an effective military and indispensable to national security. On the other hand, law that demands uniformity does so in derogation of personal freedom. For this reason, America places her military personnel under certain civil-law doctrines in order to preserve her common-law freedoms. Nonetheless, in doing so she draws a distinct line: under the Constitution, the American militia members "are subjected to martial law only when in actual service, and not merely when called forth, before they have obeyed the call." STORY, *supra* note 89, at 65–66. Moreover, American military law retains the common-law tradition's fundamental demand that in the case of orders *clearly* unlawful, each individual under that military command retains a non-delegable duty to follow the truth. Americans must guard against the Nazi's delusion produced under Bismarck's civil-law Code: viz., blind obedience to orders is a safe harbor for any crime. On the contrary, there is no safe harbor for the individual that obeys man's orders in clear violation of God's covenants.

demanding that every person worship their solidarity as the religious-political state. Because Roman paganism was unable to support Rome's early republicanism, Rome's growing empire quickly degenerated into intense forms of Babylonian hero worship,[1661] substituting Rome's chief-of-state for the Son of God; eventually gathering the three branches of government into the hand of one man—the very definition of tyranny. "The accumulation, said Madison, "of all [government] powers, legislative, executive, and judiciary, in the same hands, whether of one, few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the definition of tyranny."[1662]

Tribonianus, the chief compiler and architect of Justinian's Code,[1663] further advanced the theory of the semi-deified state incarnate in an imperial chief-of-state. In the civil-law tradition, the state or chief-of-state is said to be deified or semi-deified for the following reasons.

First, the civil law attributes to the state—whether embodied in an emperor, chief-of-state, or legislature—the attributes of deity, foremost of which is that the state recognizes no authority above itself.[1664] Dean Pound calls this trait "semi-deification" because it allows the state to excuse itself from following the law that it enforces against all others. People enable such over-reaching state power by accepting the state as the law's author, and therefore, standing above the law. Sometimes the

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[1661] See generally §§ 2.6–2.6.2 of this book (discussing the origin, meaning, and spread of early emperor worship as shepard-hero worship).

[1662] THE FEDERALIST No. 47 (J. Madison). The ancient Greek writers used the term τυραννος (*turannos:* English, *tyrant*) to denote one in whom all powers of government concentrated. To the minds of the ancient Greeks, however, the term is not always negative. The Greeks, being of a Babylonian mindset, were accustomed to concentrated power; totalitarianism was the ideal of the Greek city-state. Nevertheless, history shows that when governments have practiced tyranny according to the Greek writers' meaning of *turannos*, the result will always be negative. That the ancient Greeks saw absolute rulers (tyrants) in a positive light, is seen by the term's common use among all classes as a name for men (*Τυραννος: Tyrannos*) and for women (*Τυραννις: Tyrannis*). Luke records *Tyrannos* to be the name of the headmaster of a Greek academy in Ephesus. *See Acts* 19:8. As a rule, parents do not give their children names suggesting negative characteristics. The ancient Greeks—as all godless cultures—revered tyrants.

[1663] E. STEIN, BULL DE LA CLASSE DES LETTERS, ACADAMY ROYALE DE BELGIQUE 23 (1937), *referred to in* BERGER, *supra* note 236, at 742.

[1664] Despite recent civilians' claims that *civil law is a science confined to tangible materialism*, since the ancient past, the civil-law tradition has not so held. "Law," to the modern civilian legal scientist, "is regarded as emanating from a mystic 'Volksgeist,' or is the 'command' of an intangible, undiscoverable 'sovereign.'" L.L. FULLER, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 881 (1930–1931), *referring to* HANS VAIHINGER, DIE PHILOSOPHIE DES ALS OB (1911). "Vaihinger has taught German legal science how to use its own intellectual tools." Fuller presents Vaihinger's [p]hilosophy of 'As if [ob].'," as being similar to American pragmatism. *See id.* at 879.

state has furthered the chief-of-state's supposed deification by bestowing the title *son of god* or some like title. Nimrod of Babylon and Assyrian-styled leaders following him—the Egyptian pharaohs, Alexander the Great, the Roman emperors, Louis XI, and the emperor of Japan before and during World War II—are examples of mere men that sought such a title and the worship it demanded.

Nations and their emperors have created many ways of expressing the title "son of god," but the functional characteristics of the phrase's meaning and the results of a people's acceptance of it remain constant. For example, Bonaparte, in the spirit of the civil law, proclaimed before his defeat at Waterloo, "I am France and France is me." France embraced Bonaparte's boast and subsumed her identity in Bonaparte. France, therefore, was unable to rise above Bonaparte; thus, when Bonaparte fell at Waterloo, France fell with him. By contrast, Christ yearns for His people to find their identity in Him because He will never fail. No person (or nation) will rise above that from which it draws his identity:

> Throughout the east the majesty and glory of a people were collected in the person of their monarch, who was not feared as a man, but actually worshiped as a god . . . The word prince here is the embodiment of the community. Their glory is his glory, their pride his pride.[1665]

Second, in the civil-law world, the state's word is law from which there is no appeal. Civil-law ideals encourage migration of state power to concentration in a government of one man or one body of men in whom government forges all three of its offices (legislative, judicial, and executive) into a single imperial will. From this concentration, the state governs through its commanding bureaucracies. In ancient and modern contexts, civil law has focused all government powers in an individual, such as Julius Cæsar and Otto von Bismarck. The modern trend among civil-law states focuses all government power in a legislating body of men (legislature) that, by its single will, also controls the courts and the executive. Such courts and executives are mere rubber stamps for the

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[1665] G. CURRY, THE HOLY BIBLE WITH COMMENTARY (London, John Murray 1900) 6:123–24, *quoted in* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 55 (1974). In addition to and *τυραννος* (*turannos*: English, *tyrant*), the Greek-speaking world sometimes called the half-deification of their ruler *αποθεοσις* (*apotheosis*: literally, "from a god"). Apotheosis is the glorification of a mere human as though a god. See, *e.g., Acts* 12:21–23, for an example of *apotheosis* and the horrific outcome of its practice. *See also Isaiah* 42:8, 48:11.

state's legislation. In modern times, theorists justify this arrangement in the name of *representative democracy*: majorities—the academicians theorize—have a natural right, through their representative legislature, to impose their will (called *law* whether lawless or lawful) upon all others.

Third, all lesser civil-law magistrates, including judges and other government officials and bureaucrats, are civil servants of the state, not of the people. In civil-law nations, judges answer to the state. In practice, this means that judges answer to the leader of the political party in power, upon whom judges depend for their positions and salary. Consequently, such a judiciary seeks foremost to please the state, instead of following the truth of the law.

Fourth, in a civil-law nation, law does not bind the state or the chief-of-state and his agents: the lesser magistrates.[1666] The state, embodied in a chief-of-state or legislative body, having suspended law as to itself, commands its will and fulfills its pleasure without defined limits.[1667]

Fifth, under civil law, the only way for a nation to rid itself of an undesirable chief-of-state is by revolt or coup. This ancient weakness continues to curse civil-law societies. Consider, for example, the killing of Nimrod, the assassinations of Rome's emperors, and the perpetual strings of revolutions, revolts, and coups that have plagued France, Central America, Southeast Asia, and South America for the past 250 years.[1668]

Hegel concluded that the state is the manifestation of God on earth. It followed, therefore, that no appeal to God is necessary or even possible.

[1666] Rulers that are not bound by the laws they make is not the same as the state not being bound by higher, ultimate law that is not made by men. Søren Kierkegaard's divine prerogative to suspend the ethical does not belong to men. *See generally* SØREN KIERKEGAARD, FEAR AND TREMBLING & THE SICKNESS UNTO DEATH (1954) (1843) (discussing Kierkegaard's discussion of Abraham's attempted sacrifice of his son Isaac as a teleological suspension of the ethical, that is, social norms). Kierkegaard recognized Abraham's duty to esteem God's commands higher than his social duty to social norms and to obey God's commands by faith.

[1667] Where the state's pleasure is law, the state usurps the prerogatives of the One declaring Himself to be in the heavens and doing "whatsoever pleases *Him*." *Psalm* 135:6.

[1668] "France," said Bastiat in 1850, "also leads all other nations as the one where revolutions are constantly anticipated." BASTIAT, *supra* note 701, at 64. The host of a visitor to a Latin American country took his guest to a bullfight. Afterward, the host asked his guest, "What do you think of my country's national pastime? The visitor told his host that he considered that country's national pastime "revolting." The host, misunderstanding, agreed his guest that revolting is also his country's national pastime. The Anglo-Saxon's tradition of limited kingship never fostered necessity for revolt and coup. These remain unnecessary in jurisdictions where common-law customs foster peaceful transfers of authority and power. Common-law countries also rely on powers of impeachment and elections to provide an ordered and non-violent opportunity to replace undesirable judges and other officials.

Hitler, Mussolini, and the communist movement used Hegel's notions to justify their ideas and atrocities. Statism, fascism, and communism—the reader can add additional *isms*—are but different labels for Hegel's theory of earthly government: totalitarianism. Though one may speak of Hegel's ideas as though these were original with him, they had been practiced for centuries the world over. Hegel merely dragged the old doctrines out, dressed them up in modern terms and flung them to the world. Some have drawn justifiable distinctions between the different manifestations of emperor worship. Nevertheless, all these have the same core, attributing ultimate power to a political government of a single human will, whether of one, of a few, or of many. Such absolute power and total government, acknowledging no higher appeal, is the "state."[1669]

[1669] Two recent examples are illustrative: Kwame Nkrumah of Ghana and Kim Sung Chu of North Korea. Kwame Nkrumah, ruler of Ghana until 1966, took the title *Osagyefo* (Redeemer). Born in a mud hut and educated in Roman Catholic missions, he rose to become President of Ghana: an absolute ruler thought immortal by many of his subjects. Nonetheless, even at the height of his power he lived behind heavily guarded walls in fear of his life. Kim Sung Chu, president of North Korea until 1994, is the official deity of North Korea. According to SRN News reports of 14 July 2006, North Korea assured the world that North Koreans enjoy religious freedom. The only public worship, however, that the state permits is of North Korea's founding revolutionary demagogue Kim Sung Chu. History teaches that a pervasive consciousness of common-law first principles will check and turn away any such usurpation of state absolutism before it becomes accepted and is made official. Common-law foundations, however, will only remain where sunk into biblical bedrock.

If the ultimate authority in one's life is some earthbound religious or political leader, then the rise or demise of that leader will either make one euphoric or shatter one's world. On the other hand, if a person recognizes his Creator as God and the ultimate authority in his life, he will know that God will always remain on the throne of creation, regardless of what earthbound rulers do. The worshipper will derive his stability, or lack thereof, from that which he worships. Christians are to pray for—not worship—those in government.

For example, Isaiah admired King Uzziah and felt secure as long as Uzziah was on the throne; Uzziah's death, therefore, threatened to shatter Isaiah's world. Upon entering the Temple, however, God revealed to Isaiah that He remains on the throne eternally, while earthly rulers such as Uzziah come and go. *See Isaiah* 6:1–8. No matter how trustworthy men believe earthly leaders to be, man is to trust God alone; personal stability depends on it. The stability a person's life depends entirely upon the stability of the one in which he places ultimate confidence.

§ 5.2.2
Civil Law Demands Central Control

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion on it. This was certainly a bad method of interpretation . . . In like manner, the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.[1670]

Civil law's tendency toward concentration of power encourages worldwide central control and uniformity of law and government. The pervasiveness of civil law over the earth's surface explains the fourth and final empire described and predicted to come in the last days through Daniel's vision. Apocalyptic writings identify apocalyptic empires foremost with a place or a person; all of the empires Daniel describes are the domains of Satan, the god of this present world order, which lies in his lap.[1671] Satan, by controlling related systems of law and government entangles them and dominates the great mass of humanity.[1672]

[1670] 1 BLACKSTONE, *supra* note 12, at 58. Then civil-law tradition places positive law (legislation) above all else, thereby holding the will of the legislator above all else. At bottom, the civil-law judge takes for his major premise the detail of the state's legislation rather than the applicable first principle. For an independent and objective court to interpret legislation is to sit in judgment upon the state—insufferable to the civilian.

[1671] "We perfectly realize," declares John, "that all of this present world order is allowing itself to be seduced in the evil one's lap." 1 *John* 5:19b. Two observations of this statement demand mention. *First*, is evil never an abstraction; it exists and operates only as a person or persons. No mere thing is inherently evil, but rather, evil persons will use it as an instrument for their evil purposes. As a conceptual matter, one may distinguish the *concept of evil* from evil persons. As a practical matter, however, evil exists in one's desires, thoughts, and actions. Thus, the first cause or root of evil is not any particular thing men desire; but rather, the godless desires of men are the root of evil. *See, e.g.*, 1 *Timothy* 6:10.

At bottom then, evil is of persons and not from things. Lord Avonmere once asked barrister Curran the meaning of the witness's claim that Curran's cross-examination had put her in such a *doldrum* that she could not answer his question. "Oh, my lord," answered Curran, "it is a very common complaint with persons of this description; it is merely *a confusion of the head arising from a corruption of the heart*." FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 25 (1986) (1903) (italics in original).

Evil, Scripture teaches, arises from the person. *See Jeremiah* 17:9. Thus, in 1 *John* 5:19, John speaks not of evil as an abstraction, but as a person: *τω πονηρω* (*toe ponayrow*): articular, the evil *one*, that is, Satan. Even Scripture's first mention of evil presents it to mankind through experience with the tempter. *See Genesis* 2:9.

Second, the verb John uses here to describe this present world "allowing itself to be seduced in *the lap of the evil one*'" is the same Greek verb the Septuagint translators used to describe Samson lying drunk in Delilah's lap (*κειται: keitai*). Cf. *Judges* 16:19 (Septuaginta: Id Vetus Testamentum graece LXX interpretes edidit Alfred Rahlfs) and 1 *John* 5:19. John

As international law has recognized and as theologians of the Kingdom of God have observed, in order for other nations to recognize a kingdom or empire, history shows that two features are necessary:[1673] the claim of personal jurisdiction over an ascertainable group of people and a body of law articulating the exercise of that claim of jurisdiction. The first feature—an ascertainable class of people—demands a certain group of persons over whom a state claims jurisdiction: the right to act or exercise power. Incidental to this personal jurisdiction, states sometimes claim a bounded territory or territories as a necessary aid in defining this group of persons.

Only in modern times, however, have men considered territoriality central in determining what constitutes a nation or kingdom.[1674] For example, in pondering the concept of *kingdom* in the ancient times of Daniel's prophecy (606–533 B.C.), territoriality need only concern us as a means of defining the persons subjected to an emperor, sometimes referred to with the word *king*. Thus, in Daniel's time, territorial boundaries helped define those persons over whom the state claimed power. This civil-law notion of jurisdiction over persons translated into a potentate's possession of exercise-*able* state power over the individual,

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uses the verb *keitai* in the middle voice, indicating that this evil person (Satan) has subdued the world while it willingly lies in his lap; this world, as did Sampson, is participating in its own seduction by encouraging and enjoying it. Satan is seducing this present world as Delilah seduced Samson: the text says she "*humbled* him and his strength drained from him." John's words explain Samson's experience; his illustration is graphic. "The verb *keitai*," writes Barnhouse, "which is used to describe the world lying in the wicked one is the same as that in Homer's often repeated proverb concerning the issues that *lie* in the laps of the Gods (*Iliad* 17:514, 20:435, etc.; *Odyssey* 1:267; etc.)." DONALD GREY BARNHOUSE, THE INVISIBLE WAR 166 (1965).

[1672] Greek, *κοσμος* (*cosmos*).

[1673] *See* ALVA J. MCCLAIN, THE GREATNESS OF THE KINGDOM (1968) 17–19.

[1674] *See* J.L. BRIERLY, THE LAW OF NATIONS 118 (1955). In the view of modern view international law, territoriality has become the most weightiest indicia of nationhood, "The sovereignty of a state commonly extends to all the subjects of government within the territorial limits occupied . . . [T]he dividing line between sovereignties is usually a territorial line." COOLEY, *supra* note 61, at 2. Chieftainships of the Anglo-Saxon tribes were over others, but this personal jurisdiction was limited to the active "militia 'a going" (*fyrdfare*)—in military operations—and merely included a territorial element to limit jurisdiction over persons. The Norman monarchs, however, were distinctly territorial. *See* MAINE, *supra* note 639, at 89. For purposes of jury duty, the Normans defined the Anglo-Saxons' local groupings—the *tithing* of 10 households and the *hundred* of about 100 households—by territorial boundaries. Following the Norman tendency toward territoriality, the Anglo-Saxon tithing became the village and the hundred became the English and the American township, without regard to the number of persons or families residing within their boundaries.

i.e., over the liberty of his body, soul, and spirit.[1675] Unlike the common-law tradition, the Babylonian tradition, at heart, has never perceived of empires or kingdoms as jurisdiction foremost over a *country* (an expanse of land), but as domination of people by the long arm of its law.

The second necessary characteristic of a kingdom or nation is an ascertainable law that demands obedience of the people over which a kingdom claims jurisdiction. Further, an empire, as distinguished from a kingdom or nation, is not a single kingdom or nation, but a group of kingdoms or nations with a common allegiance to a dominating kingdom or nation, or its emperor, all being subject to the law of the dominate kingdom or nation. In short, an empire is the claimed dominion or jurisdiction of an emperor, the personification of the dominant nation.

Under these definitions and in the context of Daniel's narrative, reference to a king is reference to a single imperial will, most often an emperor; *he* is the law and government whose long arm of power extends over a plurality of kingdoms (jurisdictions) and nations (people groups). A central imperial government of such a man or combination of men over other men is the essence of civil law. Such power is often over a territory in order to define the extent of claimed jurisdiction over persons, i.e., those persons within the boundaries of that territory. For this reason, modern man increasingly includes territoriality as an element of nationality. Other institutions such as families, clans, tribes, churches, and associations, though existing within the territory of a nation, are not part of the state, except "in the ideology of totalitarianism,"[1676] which is the bent of the civil law.

Whatever else the Roman Empire[1677] of Daniel's prophecy is, it is a loose mixing of the Roman civil-law tradition throughout humanity without the imperial ability to enforce it universally from a central city. Daniel's prophecy speaks of two legs of the Roman Empire,[1678] coinciding with the eastern branch based in the city of Constantinople and the western branch based in the city of Rome. Indeed, from these two urbane centers, emperors have broadcast the spores of the Roman civil law, allowing governments of men to use the prerogatives of deity. Not always

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[1675] In the Babylonian tradition, civil law stresses state power over people and even over particular persons; in the scriptural tradition, common law stresses preservation of the individual's authority over private property, fundamentally land and its resources.

[1676] *Id.*

[1677] See generally app. 15 of this book (discussing the biblical meaning of *kingdom* as jurisdiction: i.e., the delegation to act).

[1678] *See Daniel* 2:33. See generally § 5.2.3 of this book (discussing the prophet Daniel's Roman Empire as the power of Roman civil law).

notoriously exercised, the civil law quietly levels the way for earthly governments to use god-like powers to concentrate government in urbane centers of power.[1679]

Where men have followed the civil law, the Roman Empire has continued its commanding influence, much in the same sense that it did in the first century. Rome's relationship to her empire was akin to Soviet Russia's relationship to the communist *bloc* satellite nations during the cold war. Rome ruled her first empire from Rome by the long arm of her imperial law, allowing other nations to maintain their nominal identity while demanding ultimate allegiance and tribute to the emperor, the personal embodiment of the empire. In this sense, one better understands Rome's power not as a kingdom, but as an empire: a city that commanded many kingdoms.

The Roman civil law, following its policy of concentrating power in a central city-state with a long reach into the surrounding territory, now dominates many nations, enabling cultural unity and political solidarity, which then enables central control of those nations. International organizations and tribunals now help reach this goal, but at the expense of individual rights and freedom of association: the basis of personal dignity and indispensable to the outworking of God's covenants.

§ 5.2.3
Daniel's Roman Empire: Civil Law Among Men

Nebuchadnezzär's empire was the first world empire in deed, in that he, as emperor, held enough clout and potential to make good his claim of power over all people of the then-known earth.[1680] The image's head of gold in Nebuchadnezzär's dream[1681] signified his Babylonian Empire. Nebuchadnezzär's empire, and the empires (imperial systems) following it—the Median and Persian Empire (signified by the breast and arms of silver), the Greek Empire (signified by the lower torso of brass), the Old Roman Empire (signified by the legs of iron), and the present Roman Empire mixed among the human race (signified by the feet of iron mixed

[1679] For example, in Germany the civil-law tradition loosely mixed with the Germanic folk law from the Middle Ages until about 1900, when Bismarck enacted his version of *Corpus Juris Civilis*, calling it the Code of Bismarck. Civil-law notions then escalated to their outworking with Nazism.

[1680] *See Daniel* 2:37.

[1681] *See Daniel* 2:31–45.

with potter's clay)—, have all derived, or will derive, their systems of religion, law, and government from Babylon.

Notwithstanding the disagreements between well-meaning men concerning the details of the image of Nebuchadnezzär's dream in *Daniel* 2:33, most agree that the legs of iron betoken the Roman Empire. More precise, the iron indicates Rome's jurisdiction exerted through her civil law: a claim of power over persons, and not over any bounded territory, except as such boundaries assist in identifying particular people groups targeted for domination.[1682] Rome claimed jurisdiction *in personam*: the right to exercise force and threat of force over individuals. The image in Nebuchadnezzär's dream has feet and toes made of two incompatible substances, mingled but un-joined: iron and potter's clay. The two mixed elements betoken Roman law mingling among humanity. The iron represents Roman law; the potter's clay represents humanity.

Daniel 2:7 through 7:28 records Daniel's words to emperor Nebuchadnezzär, whose native tongue was Aramaic; thus, this passage is among the few portions of the Old Testament not written in Hebrew but in Aramaic. Daniel uses the Aramaic term *melecku*[1683] to denote the fourth kingdom (empire): Rome's empire. Clay mixed with iron to form the feet of the image in Nebuchadnezzär's dream, Daniel says, represents the seed (singular) of frail and mortal men (*'anasha*).[1684] Daniel's choice of terms is precise: *'anasha* denotes humankind in his frailty as descended from Adam,[1685] and *seed*—in the singular—must denote Christ as the one receiving the covenant promises Adam forfeited.[1686]

Moreover, Daniel had more good reason to choose his words with caution and accuracy: Nebuchadnezzär's mood was intolerant of anything less than the unvarnished truth.[1687] Daniel gave to Nebuchadnezzär the interpretation of Nebuchadnezzär's dream with

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[1682] See app. 15 of this book (discussing the meaning of Scripture's terms for jurisdiction: מלכו (Aramaic: *melecku*) and *βασιλεια* (*basileia*).

[1683] The empire referred to here is מלכו (Aramaic: *melecku*): translated *kingdom*, it is best understood as "jurisdiction" claimed or the right to act. See id. (discussing *melek* as jurisdiction: i.e., the delegation to act toward certain persons, concerning a certain matter, or within a defined territory).

[1684] Aramaic: אנשא (*'anashah*). *See Daniel* 2:42.

[1685] "Man at his best," says Bishop Ryle, "is still man, at best."

[1686] This interpretation follows the hermeneutic of Paul. *See Galatians* 3:16. God's covenant promises are incompatible with the Babylonian tradition of religion, law, and government because the claims of God through Christ are righteous and, therefore, rightfully total; while the claims of the state are unrighteous and, therefore, without right. Totalitarian claims usurp the claims of God. *See* ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 255–56 (1974).

[1687] *See Daniel* 2:9, 12–13.

Nebuchadnezzär having already delivered his sentence of death against Daniel.[1688] Scripture gives a picture of Daniel delivering the interpretation of the dream with the king's sword hanging over Daniel by a thread.

Thus speaking with precise words, Daniel states that even though the iron and the clay *mingle*, these two materials will never adhere to each other[1689] because rivalry has divided these, one *against* the other. Describing the mingling (*erev*)[1690] of the iron and clay in emphatic terms, Daniel uses the reciprocal stem of the Aramaic verb *peleg*,[1691] signifying a mixing of incompatible substances in discord. Whatever else Daniel means by this, he signifies a through entangling of Rome's power and law with humanity.

To use an analogy from chemistry, the power and law of Rome mix with all of humanity, but do not adhere to—by compounding and bonding—any of them. As iron and clay are incompatible in essence, so are the elements of Rome's power and law with all the sons of Adam. Iron represents Rome—Rome referred to her legions as the iron legions—and potter's clay represents humanity in its weakness.[1692] In conclusion, the feet of Nebuchadnezzär's image indicates that the civil law and government of Rome, mixed among the populations of the earth, is the final empire before the return of Christ in power and glory: the only true conquering Hero.[1693]

[1688] *See Daniel* 2:13.

[1689] *See Daniel* 2:42: Aramaic, דנה עם דנה (*dana 'im dana*). Literally, "this with this," denoting two materials in close proximity, while each repels the other: two incompatible materials mixed but never adhering; therefore, without durability, prone to breaking apart and crumbling.

[1690] *See Daniel* 2:43: Aramaic, מתערב (*metharav*), from the root ערב (*'erev*). "A transitive verb ערב [*'erev*], 'to mix with' requires ב [*beth*] (D[aniel] 2:41, 43), but עם [*'im*] is found in D[aniel] 2:43." FRANZ ROSENTHAL, A GRAMMAR OF BIBLICAL ARAMAIC 34 (1983). This use of the preposition *'im* following *'erev* is rare and therefore emphatic: *thoroughly* mixed with. *See id.* at 36.

[1691] *See Daniel* 2:40: Aramaic, פלגה (*paleegah*). *See, e.g., Genesis* 10:25 (using the Hebrew cognate of this verb in a like sense to Daniel's use).

[1692] The English *humanity* stems from *humus*: dirt or "clay." Likewise, the Hebrew אדם (*'Adam*) stems from אדמה (*'adamah*): also dirt or "clay." *See Genesis* 2:7, 3:19, 23.

[1693] *See John* 16:33: "I have," said Christ, "conclusively conquered the world."

§ 5.3
Common Law:
Controlled by First Principles

The law does not consist in particular cases; but in general principles which run through the cases and govern the decision of them.[1694]

Justice Robert A. Jackson was the last of the apprentice-trained lawyers to serve on the Bench of United States Supreme Court. The apprentice method of legal training has established the American ideals of law and government by loyalty to *first principles*:

> [T]his vanishing country lawyer has left his mark on his times and is worth knowing. He read law in the *Commentaries* of Blackstone and Kent and not by the case system. *He resolved problems by what he called "first principles."* [Men such as these] controlled county court houses and the state houses and the nation's capital as well . . . There isn't the whiff of the stable in a carload of college freshmen. More and more those who . . . restate our legal principles are men who have not experienced the country life of which our law was so largely the expression.[1695]

Because no one can foresee all the combinations of facts that will bob forth from the churning turmoil of human experience—as the sparks fly upward[1696]—, it follows that neither can one learn, in advance, the right response to every legal conflict with which one will grapple. One, however, can learn the finite set of first principles applicable to govern any particular disagreement. To be ignorant of first principles will bring confusion, bewilderment, and loss of confidence:

> [If] uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder . . . [such an one will] never aspire to form, and seldom expect to comprehend any arguments drawn *a*

[1694] Lord Mansfield *in* Rust v. Cooper, English Reports 98, at 1279.

[1695] THE PRACTICAL COGITATOR 454–55 (Charles P. Curtis Jr. & Ferris Greenslet eds., 1945) (emphasis added).

[1696] *See Job* 5:1, 14:1.

> *priori*, from the spirit of the laws and the natural foundations of justice.[1697]

To know and understand the first principles of the law is to recognize their violation—quickly, indignantly, and persistently. God has authored the first principles from which men must derive all true applications of law, but has left the application to men, instance by instance, as these arise.[1698] Attention to executive regulations, administrative tribunals, and other interpretive and detailed legislative pronouncements distract from the weightier matters of the law, which are its first principles. Indeed, where one follows of administrative regulations in disregard to first principles, one will not achieve justice.[1699] According to Christ, first principles are all-encompassing personal matters in contrast to administrative minutia, such as undue attention to persnickety details of the law of tithing that swallows (dominates) the weightier matters:

[1697] 1 BLACKSTONE, *supra* note 12, at 1.

[1698] As that which is unambiguous is to control one's interpretation of that which is ambiguous, and never the other way around, one must apply first principles of law, each in keeping with its purpose.

[1699] *See Matthew* 23:23. The Pharisees applied the law unlawfully, which is legalism: working the law to selfish advantage, whether through state power or otherwise, later called scholasticism. If a scribe or Pharisee found a quarter on the sidewalk, he was meticulous about tithing exactly two pennies and two farthings from it. In using the comparative *weightier* (*τα βαρυτερα*, *ta barutera*: comparative suffix *-τερα*, i.e., weight-*ier* things), Christ affirms that all legal matters are "weighty," (have dignity), but that some are "weighter" (have more dignity than others). Attention to the details of the law's application is vital and even necessary. On the other hand, Christ saw through the Pharisees' addiction to detailed interpretive applications and the resulting violations the law's weightier matters: *the* judgment, and *the* mercy, and *the* faith (*την κρισιν και το ελεος και την πιστιν*). Placing the conjunction *και* (*kai*) before each of these three weightier matters makes for clumsy English, but is good Greek: the writer intends His listeners to slow down and ponder each one without rushing through them as though tabulating an itemized list. The Greeks, in naming this literary structure, conjoined three terms: *πολυς* (*polus*), meaning "many"; *συν* (*soon*), meaning "together"; and *δειν* (*dein*), meaning "to bind": hence, *πολυσυνδετον* (*polysyndeton*), "many bindings together," i.e., many conjunctions. In a word, the Pharisees had developed the art of applying the right law the wrong way (unlawfully), in order to get their cravings, which is legalism: working the law to selfish advantage, sometimes called *cabalism*; the Greco-Romans later called it scholasticism.

In this verse, says Hebraist Walter Kaiser, Christ used a literary device common among the ancient Hebrews. Kaiser calls this Hebraism *light and heavy*: those particular applications of the law dependent upon first principles of the law, where applied aright, are small pictures of the real or *weighty* matters. Indeed, man never knows the law in mental contemplation alone, but only in its application to the real cases of life. In demonstration, Kaiser cites the following Old Testament examples: *Exodus* 16:12, *Jeremiah* 12:5, and *Deuteronomy* 31:27. Kaiser concludes that the particular applications of the law are small pictures of the real or *weighty* implications. *See also Micah* 6:8. Therefore, the weightier matters of the law Christ speaks of (first principles) reveal themselves as one rightly applies them to particular facts and circumstances.

judgment, mercy, and faith. Scripture allows straining at gnats; but while one is straining at them, one must never swallow a camel. Only as one pursues the law's first principles, will one follow the law's details aright; the exception will then never swallow the rule but, rather, will re-enforce it. [1700]

The law's weightier matters are personal and, therefore, relational. Over time, Providence has squarely rested the common-law tradition upon biblical foundations: the first principles upon which the common law stands and without which it falls. The common law never evolves; rather, it expands the understanding and application of its unchanging first principles. As a boy's body builds to the stature of manhood only by the commands of his ever-present genes, the common-law builds according to the commands of its ever-present first principles; any thing contrary to these is not part of the common-law. The common law demands, therefore, that lawyers begin their analysis of legal disputes by resting their thinking upon these first principles and not upon scholastic rationalizations, witty novelties, the decrees of regulators, or cynical sophisms.

Operating foremost in the context of relationships, the common-law tradition comprises principles consonant with Scripture, discoverable by universal innate ability, proven by experience, articulated in court opinions, and available for guidance concerning how to apply these principles in future cases.[1701] Scripture indicates that the truth and its

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[1700] "The exception to the rule," said Bacon, "establishes the rule, in cases not accepted." *See, e.g., Exodus* 1:15–21, 3:22, 12:36, *Joshua* 2:1–24. To be lawful, the so-called exception to any rule must "vindicate the old one from misrepresentation." 1 BLACKSTONE, *supra* note 12, at 70.

[1701] The common law of evidence considers presuppositions of fact unavoidable:

> In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.

JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE 279–80 (Boston, Little, Brown, and Company 1898). Presuppositions are not those facts accepted without proof of evidence, but accepted upon indisputable evidence See, *e.g., Romans* 1:18, where Paul begins his reasoning upon facts arising from indisputable evidence known in common by his readers, and therefore, without need of further proof. See also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), where the reasoning begins with a presupposition of fact commonly known upon commonly understood evidence, i.e., self evident: "WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." (capital letters in original).

applications are discovered by reasoning *from*[1702] revelation as opposed to, for example, reasoning from recent news stories, the latest poll or referendum, pronouncements of a legislature or executive, foreign or international court opinions, or expediency. Likewise, reasoning from legislative decrees of men that are inconsonant with God's Word written, is reckless. The rudimentary rules of law are, as Blackstone calls them, the living oracles of the law:

> [T]hat where there is a right, there is a remedy, and if there be no remedy by [legal] action, the law will, in some cases, provide one in another way—that the law looks not at the remote but at the immediate cause of damage—that the Act of God shall not, by the instrumentality of the law work an injury—that damages shall not, in general, be recovered for the non-performance of that which was impossible to be done—that ignorance of the law does not, although ignorance of the facts does, afford an excuse[1703]—that a party shall not convert that which was done by himself or with his assent, into a wrong—that a man shall not take advantage of his own tortuous act—that the abuse of an authority given by law shall, in some cases, have a retrospective operation in regard to the liability of the party abusing it—that the intention, not the act, is regarded by the law,—and that a man shall not be twice vexed in respect of the same cause of action.[1704]

In the common-law tradition, all hierarchical legal authority must conform to fundamentals—the controlling first principles. Thus, in common-law litigation and appellate argument, legislation and judicial findings lose the detailed neatness and precision civil lawyers demand. Common law prefers cogent, one-step inferences from a first principle of

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[1702] *See Acts* 17:2. *Απο* (*apo*), often translated *from*, signifies movement "away from" and, therefore, only occurs with the ablative case (the ablative signifies separation). As used in *Acts* 17:2, it highlights Scripture as the source, presupposition, and starting point of reasoning, away from which one moves by inference, providing the major premises.

[1703] In response to the confusing complexity engendered by government's goal of all-embracing tax law, the United States Supreme Court has held that ignorance of the law is a complete defense to accusations of tax crimes. *See* United States v. Cheek, 498 U.S. 192, 87 S.Ct. 22, 112 L.Ed. 2d 617 (1991).

[1704] HERBERT BROOM OF THE INNER TEMPLE: BARRISTER-AT-LAW AND READER OF COMMON LAW IN THE INNS OF COURT, LEGAL MAXIMS CLASSIFIED AND ILLUSTRATED 190–91 (Philadelphia, T. & J.W. Johnson & Co. 1874).

law to its application, instead of civil law's scholastic-like arguments—reasoning stretched out. "He who draws a labored length of reasoning out," writes Justice Story, "puts straws in lines for winds to whirl about; He who tells a tedious tale of learning o'er, counts but sands on oceans boundless shore."[1705] Sophisticated reasoning never sanctifies legislative and judicial pronouncements that are contrary to truth, i.e., unlawful.[1706]

The common-law tradition, therefore, embodies the unspoken demand that courts seek and ascertain truth as expressed by first principles of law, acknowledging their superiority over any formal systemization of intellectualism regardless of its label: Socratic method, Aristotelian reasoning, *molech* worship, scholasticism, Kantian philosophy, French rationalism, German legal science,[1707] or economic jurisprudence. The labels have varied over time,[1708] but the error remains

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[1705] *Quoted in* GEORGE ROSSMAN, ADVOCACY AND THE KING'S ENGLISH v (1960).

[1706] Thus, even though a law is right and it is applied right, if its application is done to achieve even a remote wrong (an indirect wrong effect), such use of the law is unlawful. *See* 1 *Timothy* 1:8: "But we understand that the law is good [*καλος* (*kalos*): produces a favorable result because it springs from, and is according to, the law's good essence or *αγαθος* (*agathos*)], if it is used in a lawful manner [*νομιμως* (*nomimos*), adverb: by the proper process, i.e., lawfully].

[1707] "Might not a fresh interpretation of the common law," says Mark De Wolfe Howe, "serve at once to protect it from the tyranny of German metaphysics, and to tell the philosophers that the story of the common law's faltering growth may tell them much that they should know." OLIVER WENDELL HOLMES, THE COMMON LAW xix (Mark De Wolfe ed., Fellows of Harvard College 1962) (1881). The value of Holmes's book is in its historical information. Justice Holmes, a Darwinian, bore an antipathy for Scripture. Howe's statement is commendable, but incongruous with Holmes's faith; Holmes embraced, among other notions, German metaphysics and German empiricism. See, *e.g.*, § 2.14.1. of this book.

Holmes's Darwinian materialism and intellectual elitism is manifest in Buck v. Bell, 274 U.S. 200 (1927). In *Buck*, Holmes upheld the constitutionality of mandatory sterilization laws as applied to Carrie Bell, stating of Carrie and her family that three generations of imbecility is enough. Those promoting Darwinian faith consider themselves to be on the more developed end of the evolutionary scale: at the top of their phylum, while relegating those with whom they disagree to the bottom.

[1708] Adam's initial error in the Garden of Eden was his desire to be as God: to have absolute authority, absent the divine first principles, to calculate and determine—by his unaided intellectual prudence—standards of behavior to apply to future conflicts in order to insure his future tranquility. Adam desired and claimed the ability to *perceive* (ידע: *yada*), in the present, the inward and latent being of good (טוב: *tov*) and the inward and latent being of evil (רע: *ra*). *See Genesis* 3:5. Thus, Adam attempted to become as God: able to predict and prejudge before the fruits of good and the works of evil have yielded tangible evidence of inward worth. Only God, however, is able to discern the thoughts and intents of the heart (desire) without the aid of objective evidentiary proofs. Man, on the other hand, will only know the inward essence of himself and others by contemplating in hindsight, past behavior, i.e., by their fruits or lack thereof. In each case, not reason, but tangible evidence of fact is the foundation of the common law: common-law inferences rest on evidence. Neither David nor Paul the apostle trusted himself to understand even his own intentions.

the same: mortal man wholly depending upon his fallible mental ability[1709] to serve as his final arbiter of right and wrong—his lawgiver.

Billy Herndon, Abe Lincoln's law partner, illustrated Lincoln's mental habit of harking back to the source of a matter. While in the law office of Lincoln & Herndon, in Springfield, Illinois, a friend showed Lincoln and Herndon a picture of Niagara Falls. Lincoln, having never seen the Falls or a picture of them, responded in genuine contemplation, "From where does all that water come?" As was John Tewkesbury, Lincoln was "liking to get to the bottom of everything."[1710] Practicing law by first principles is

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See 1 *Corinthians* 4:4, where Paul uses συνοιδα (*sunoida*) with the emphatic negative: "to know nothing about one's self." God knows each individual infinitely better than that individual knows himself. "Such knowledge," writes David, "is too wonderful; it is high, I cannot reach it." *Psalm* 139:1–6, 23–24. *See also Jeremiah* 17:9–10. See generally § 2.6.1 of this book (discussing the ancient worship of *molech*, pointing out that Adam has passed on to his descendants his penchant to rely upon his own mind to insure his future security). The Babylonian settlers systematized and institutionalized the tenants of molech worship in their law and government; this tradition has scattered throughout Adam's race in the civil-law tradition.

[1709] *Proverbs* 3:1–8 exhorts the reader to trust God as lawgiver: the final arbiter of right and wrong, without appeal. Ponder the following verses:

> 1. My son, you shall not forget my law, *but* let my founded standards establish your desire . . .
> 5. In all your desire, be confident toward the LORD, *but* you shall not rely upon your own capability of *prudence* [בינתך (*benaticah*): the intellectual ability to calculate a present standard of behavior to be applied to future human activity that will insure a desired result].
> 6. In all your ways acknowledge Him, *then* He shall direct your outcomes.
> 7. You shall not become wise in your own eyes: Fear the LORD and turn away from [סור (*sur*): i.e., do not challenge evil directly by squaring off with] evil.

Christ interdicts against the popular supposition that man must depend on his own brains and brawn to challenge evil toe to toe: "But I tell you to not resist the evil one." *Matthew* 5:39. In this verse, Matthew uses the Greek infinitive with the privative subjunctive: μη αντιστανα (*antistanai*). Expanding the translation of Matthew's words brings color to the picture, "Do not think that you—by your own intellectual ability—can stand face to face (as in a face off) with the evil one." One must never consider squaring off with a superior foe on the foe's terms, unless no other option is available. When resisting evil, Scripture and the common law each provides other remedies that one must exhaust without satisfaction before squaring off with evil.

[1710] Lincoln's habit of mind drove him to the first principles of the Declaration of Independence as the reason behind the Constitution's particulars meant to limit government. This habit also drove him to seek out by clear evidence the intent of the Framers of the Constitution; by painstaking diligence he uncovered—individual by individual—the personal views of the Constitution's Framers and presented his findings in his Cooper Union address in New York City. Harking back and discerning each of the Framers' convictions, Lincoln used these evidences to make personal to Americans the intent of the Framers. Making the law personal requires reaching back to its source and

comparable, requiring that the practitioner forever ask what the source of any claimed standard of law is, trace it to its source, discern the validity of that source's claimed authority and the purpose of the standard, and measure its particular application against the controlling first principle. Wrapping up one's thinking in the demanding details of administrative and civil law without measuring these particulars against first principles keeps our law and government drifting about on the sea of the state's subjectivity, i.e., the state's arbitrary will.

The benefit of written language then unavailable, the ancient common law rested on custom and oral trial. The advent of written English during the reign of King Alfred and the recording of case opinions during the reign of Edward I., enabled common lawyers to examine and ponder the purposes behind the ancient customs. The Normans, having taken on Roman influences during their century and a half sojourn in France, carried these influences to England in 1066. Certain of these, such as organizational skills, the common law used to strengthen itself; others, such as reliance upon royal decrees, weakened the common law. Eventually, however, the Scots, having retained their reliance on first principles, permeated England's courts, reinforcing first principles "as the mainspring of the common law and as a means of threading through the thickets of particularity."[1711]

As case opinions multiply, opportunity for finding a previous case akin to the case under consideration (precedent) increases. Such a precedent, however, is not the authority; the authority is the first principle. Precedent case opinions are, rather, the evidence of the principle. The first principle evinces the precedent and not the precedent the principle. "It [the common law] seems to be new in its instance," says Sir John Holt, "but is not new in the reason or principle of it."[1712]

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developing an understanding of and the mind of the Author. To hark back to first principles was also the conviction of the Protestant reformers: back to the fountain, *principium,* or source to receive the covenant relationship, its understanding, and its authority directly and personally from the law's Author.

God's covenants are His personal promises to His people that He has fulfilled and will always keep. These covenants establish the relationship that ends rebellion against God and inspires an individual yearning to please God through learning and obeying His law. God has sworn to keep His promises to His people (*see Hebrews* 6:17–18), has sealed this commitment with His blood (*see Acts* 20:28) and, by His written record, has perfected His acts loyalty. *See* 1 *John* 5:11.

[1711] HEWARD, *supra* note 386, at 170.

[1712] Keeble v. Hickeringell, 11 East 574, *quoted in id.* The meaning of constitutional guarantees never varies, wrote Justice Sutherland, but "the scope of their application must expand or contract to meet the new and different conditions." Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

If lawyers, judges, jurors, or any other lacks a sense of the law's majesty, it is because the law is majestic only to the one acknowledging the absolute majesty of the law's source and the purity of the law's first principles springing from that source. In short, law is majestic only if its author is. The law's majesty is fundamental to the common-law tradition; it consists in its first principles, which the Word of God reveals: the perfectly revealed, divine, inerrant, and universal pattern of law and government.

§ 5.3.1
Common Law:
Some First Principles

The adversity that drives one to cleave to first principles, says Matthew Henry, strengthens one's stand "as the shaking of a tree makes it take the deeper and faster root . . . [and] to cleave so much the more closely to his first principles, and to review them."[1713]

The majesty of law consists in the timelessness of its foundational principles—i.e., its never changing controlling precepts, without which the law is unworthy of respect. Common law eludes definition because it is not, at bottom, a list of laws but a worldview of law and government comprising leading principles of process and procedure proven reliable to uncover truth, while protecting human relationships freely entered. The common-law tradition demands that opposing parties aggressively prosecute legal conflict while observing pre-established procedures and methods, applied in a way best calculated to afford fair play. Put another way, common law is not a set of strictly enforceable laws, but is a tradition of guiding convictions that control how individuals, courts, and governments discover, weigh, decide, articulate, and apply law in particular cases.

Setting forth characteristics distinguishing common law from civil law make clear the features of the common law. For example, Devlin defines the common law[1714] by setting it apart from the Roman civil-law Code in four respects. *First*, common law requires lower courts to follow higher appellate court findings. *Second*, common law is inarticulate until a court

[1713] *See Psalm* 11:4–7.

[1714] *See* PATRICK DEVLIN, THE JUDGE 177 (1979) (presenting distinguishing properties of the common law).

expresses it in judgment.[1715] *Third*, in the common-law tradition, the judge or the juror decides a given case with the presumption that the law's proper application already exists; therefore, he must discover, discern, and articulate it harmonious with all relevant considerations, including higher law. *Fourth*, if a common-law judgment is an appellate opinion, judges under that appellate court's jurisdiction are bound to follow that opinion. In doing so, however, the court considers more than the appellate court's conclusion or finding by looking for the reasons that compelled the appellate judge to decide the case the way he did: the "reason for deciding" or *ratio decidendi*, as it came to be called. Thus, the principled reasons of the judge's opinion establish the common law.

The common law, says Chancellor Kent, distinguishes itself from legislative codes by its principles and rules of action:

> [T]he body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or *from the judgments and decrees of the courts* recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.[1716]

In addition to the distinctions cited above, the following characteristics distinguish the common-law tradition from the civil-law tradition. *First*, in the common-law tradition, each individual receives direct authority from God.[1717] Every person receives this authority through natural means (by nature: viz., natural law);[1718] some receive additional authority through other men; some receive additional understanding through spiritual means.[1719] In all cases, each individual shall answer direct to God.

[1715] See generally § 5.1.5.1 of this book (discussing the common law's requirement of a *real case and controversy* for a court to have jurisdiction).

[1716] Emphasis added.

[1717] See generally § 3.7.5 of this book (discussing the individual's direct responsibility to God, according to the Bible's dominion doctrine as understood by Richard Fitzralph, Archbishop of Armagh, and his best-known pupil John Wyclif).

[1718] See generally § 5.1.2 of this book (discussing God's universal dispensation into human nature of the capability to discern right from wrong, in light of *Romans* 2:14–15).

[1719] *See id.*, under the heading *Additional Ability Provided to God's Redeemed.* Writers often refer to the giving of authority direct from the fountain of authority to the individual as *immediate*, and use the term *mediate* to signify the giving of authority indirect from the fountain of authority to the individual. All false religion and false government demand an elite cast, often called "the priesthood." as mediator between the individual and deity,

Second, the common-law tradition considers law to have always been in the mind of the Creator. Neither the people, nor their representatives, nor the chief-of-state can legislate or originate law. Thus, neither legislators nor judges create law and its manifold applications; instead, such men discover and discern law and its application from eternal first principles existing in the mind of the Creator.

Third, the common law places government officers and magistrates under the same law as the people. For example, the courts disallowed former Presidents Nixon and Clinton exemption from the law.[1720]

Fourth, the common law imposes upon public officers and magistrates ultimate responsibility to the Godhead and the people, not to the state or any chief-of-state—whether king or queen, emperor or empress, executive or priest or president—to enforce law and to resist illegal acts of offenders.

Fifth, the common-law tradition demands independence of the judiciary, forbidding the executive or legislative power from meddling with the courts. Augustus, the Roman emperor, exerted control over *his* judges, whether praetor or judex. Today among civil-law states, tradition of policy demands that the courts remain under control of the legislative power: whether the chief-of-state or the legislature, whether called regulation or Code. Independence of the judiciary is not a feature of civil law, but is foundational to the common-law tradition. Freedom will persist only as the courts judge with suspicious independence all other powers of government. Further, the assurance of this independence is the common-law Jury. Independence of the judiciary has been a common-law distinctive in past as well as in modern times:

> As Montesquieu well knew, the judiciary was not independent in France and other countries that derived their legal systems from the Roman civil law. In France, a judge is a civil servant of the Ministry of Justice, appointed upon graduation from law school, whose assignments,

manifest as the state. See generally § 2.14.2 of this book for examples of the contrasting use of mediate and immediate in the context of evidence in civil-law tribunals.

[1720] By contrast, civil law condones men ruled by their passions, who, in turn, dominate others by appealing to those same passions in others. Former President Bill Clinton once said—in eerie resurrection of phraseology out of Filmer's seventeenth-century defense of civil law's doctrine known as the divine right of kings—that the American people had elected him to, "take care of" them. He also said that he was not above the law, but neither was he under it. These are imperial civil-law notions. *See* SIR ROBERT FILMER, PATRIARCHA: A DEFENCE OF THE NATURAL POWER OF KINGS AGAINST THE UNNATURAL LIBERTY OF THE PEOPLE (1680), *discussed in* SIDNEY, *supra* note 451, at XVI–XVIII.

> promotions, and tenure are dependent upon pleasing the Minister of Justice. Such Judges are in no position to oppose the unconstitutional tyranny of a Napoleon, an Adolf Hitler, a Joseph Stalin, or a Latin American military dictator.[1721]

Civil-law judges failed to oppose any of these tyrants; for the same reasons cited above, neither are civil-law judges in a position to oppose tyranny in our own day.

King George III. opened the first Parliament of his reign stating that the independence of the courts was among the best securities of the rights and liberties of his loving subjects.[1722] "[T]here is no liberty," said Colonel Alexander Hamilton, "if the powers of judging be not separated from the legislative and executive power." He then adds, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."[1723] In summary, independent courts are the most fundamental and indispensable aspect of the common-law separation of powers.

Sixth, the common-law tradition subjects executives and magistrates to impeachment and removal. Though seldom used, the threat of impeachment restrains office holders from lawless behavior and allows termination before abuse of power escalates. Where executives and

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[1721] MO. L. REV. 2 (1988). *See also* SAWER, "Legal Profession," 10 ENCYCLOPAEDIA BRITANNICA, *supra* note 379, at 778.

[1722] In light of the hatred engendered toward George III. during the War of American Independence, some Americans will dismiss George's statement as insincere. It takes on more credibility and meaning, however, when pointed out that Prime Minister William Pitt likely wrote this speech. *See* MO. L. REV. 2 (1988). The American Colonials' quarrel was not with George III. as much as it was with Parliament, which, over 100 years before, had subsumed the Crown's sovereignty. Parliament attempted to control the colonial governors and courts, holding with William Blackstone that common-law protections were not applicable in the American Colonies. The Americans disagreed, citing their colonial charters as authority. George III. had forborne aggressive meddling with the affairs of Parliament, choosing instead to give his attention to farming, his wife, and their children. He did get involved, however, once he recognized that Parliament had botched relations with the Americans. However, it was too late; George's meddling worsened matters.

In our day, the English select only judges with long experience and practice, tenuring them for life. They are not dependant for their position or livelihood upon the Crown, the prime minister, any bureaucrat, or political appointee. Consequently, English judges are independent in the common-law sense: un-beholden to anyone's favor for his position or pay. The history of the English courts has provided their tradition of independence, enabling boldness in judgment against the will of the Crown (the executive power) and of Parliament (the legislative power). William Shakespeare illustrates the independence of the English judiciary in *Henry IV.*: Chief Justice Sir William Gascoin never hesitated to hold the Prince of Wales—King Henry V.—in contempt of court. *See Henry IV.* (V. ii.).

[1723] THE FEDERALIST No. 78 (A. Hamilton).

magistrates never face the possibility of impeachment, revolt and coup are common—being the only other options for getting shed of an undesirable office holder. In addition, genocide sometimes arises because rulers in civil-law countries know that without possibility of being impeached their lives are only as secure as their willingness to use their power against any who threaten their position. By way of contrast, in common-law countries coup is uncommon and genocide is unknown. The twentieth century has been the most barbaric and bloody in the history of humankind: approximately 172 million have perished by some form of genocide. None of these genocides, however, occurred within the borders of common-law countries, but occurred in countries held under the sway of some variation of civil law,[1724] where orderly impeachment and removal of tyrants was unavailable.

Seventh, common law entitles every person to due process of law.[1725] Common lawyers have always recognized the indispensability of due process, even dubbing it *the supreme law of the land*.[1726] During the fourteenth century, they called due process *natural law* because it was knowable to all willing to consider the worth of its requirements. Today, the courts equate common-law due process with "fair play[1727] and

[1724] Genocide has been a ready political tool within the civil-law régimes of the communist bloc. "In total, Marxist regimes murdered nearly 110 million people from 1917 to 1987. For perspective on this horrible count, one may note that all domestic and foreign wars during the twentieth century resulted in the deaths of about 35 million. Marxist control of societies has proven deadlier than all the wars of the twentieth century combined, including World Wars I and II, and the Korean and Vietnam Wars." R.J. Rummel, *History's Greatest Killing Machine* (last modified 15 December 2004) <www.worldnetdaily.com>, *quoted in* THE SCHWARZ REPORT, vol. 45, No. 4, Apr. 2005.

[1725] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1726] The Founders used this ancient common-law phrase, *the supreme law of the land*, in the Supremacy Clause of the Constitution. *See* U.S. CONST. art. VI, cl. 2.

[1727] Historically, continental Europe came to identify the phrase *fair play* with the British life and with a specific meaning, as it pertains not only to common-law trials but also to all kinds of contests. Fair play means to abide by preset and time-proven rules of engagement that allow one's opponent a genuine opportunity to prove his cause or his worthiness. In government and the courts, observance of fair play rests upon the conviction—now often ignored but nonetheless still operative—that men naturally suppress truth by sin, but that truth emerges through adversity. See generally *Romans* 1:18, where Scripture states that though men hold truth, they hold it *down* (*κατεχοντων: katechontone*, holding *down*, i.e., present active participle, "to unceasingly suppress"). Observance of fair play is with a view toward allowing enough time and play for truth to surface from under the evil intent and machinations that holds it under, so that, as it is said, the best man may win. The common-law principle of fair play does not seek perfection, but rather, that the worthier cause in the contest prevails.

substantial justice." The common law insists that each party with an interest in a legal conflict enjoys two rights: timely notice of the scheduled hearing on the matter at issue and a genuine opportunity to be heard by the court. Either side (or all sides) of any dispute is entitled to a genuine hearing.[1728]

Due process of (common) law applies where the rights of life, liberty, or property are at stake;[1729] thus, due process applies not only to all litigation, but also to all workings of government. Due process also applies to all internal government affairs and activities—from legislative processes, to law enforcement—by demanding that the courts and

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By the early nineteenth century, the concept *fair play* had deeply ingrained in American ideals of how one must conduct one's self in all kinds of adversity. For example, while crossing a stream, an alligator latched onto and took under a young Kentuckian serving in Andrew Jackson's Florida campaign. His friends, rushing to help, watched as the alligator pulled his intended meal under the surface of the water; then, when his head emerged from the water and he saw the determination of his friends to interfere, he hollered at them to stand away, "Give him *fair play*," he said, before the alligator pulled him under again. According to witnesses, the Kentuckian, while dragged under the water the second time, gouged out the animal's eye with his thumb. Wounded and confused, the alligator let loose and swam off. "That gator," he said "fought me a fair fight."

[1728] Criminal defense lawyer Donald MacPherson observes, "No pancake is so thin that it does not have two sides." *See Proverbs* 18:17, "The first [to plead appears] just in his accusation—[then] enters his challenger [רעהו (*ra'awho*): a corresponding one or *peer*], and thoroughly cross-examines him." *See generally Acts* 24:5, 16, 13 (these verses considered in the foregoing order provide an illustration of *Proverbs* 18:17). Many English translations render *ra'awho* in *Proverbs* 18:17 with "friend." So also, Gesenius defines it, adding that Scripture often contracts *ra'awho* to *rhey*, but that *ra'awho* is "the full form preserved." *See* GESENIUS' HEBREW GRAMMAR, *supra* note 152, at 231. The translation *friend* is possible but doubtful; "friend" assumes too much.

The "challenger" of *Proverbs* 18:11, is best understood as the plaintiff's *peer*: the one qualified to judge the accuser's accusations because his standing in life is comparable to that of the accuser and the accused. *Peers* are those corresponding, as *pairs* com-*pare*: alike, matching, and best judged against one another. Flaws in objects meant to match—such as a pair of shoes—become apparent where they differ.

That this *ra'awho* is not synonymous with the "friend" of *Proverbs* 18:24 that sticks closer than does a brother is certain because *Proverbs* 18:24 uses a much stronger term of intimacy (אהב, *a'hav*: participle, "one who loves and is beloved"). Rather, *ra'awho* denotes, at most, a companion; writers using it hardly ever intend even that much. See, *e.g., Genesis* 15:10, were Moses uses this identical non-contracted form (*ra'awho*) to signify corresponding and symmetrical body parts of animals lying opposite one another. In *Proverbs* 18:24, *ra'awho* refers to the one standing opposite, objective and skeptical: viz., the challenger.

At the least, in the common-law tradition the accuser must be subject to intense cross-examination by the accused or his counsel. By contrast, in the civil-law tradition, the accused is subject only to inquisition by the state: i.e., the judge. Cross-examination is forbidden.

[1729] Life, liberty, and property each are interests and, therefore, property because not only does one have rights in one's property, one also has property in one's rights. See generally app. 14 of this book (discussing property as rights and rights as property in the context of American organic law).

government operations observe fitting established procedures designed to slow down government machinery, thereby enabling parties of interest to ponder what is transpiring in time to object. Without due process, legislators will force laws through government and powerful plaintiffs will force their cases through the courts rapidly, before victims—intended or unintended—have opportunity to notice, ponder, and object.

Eighth, the right to trial by jury is a foremost defining quality of the common law and remains unknown in Roman civil-law states or elsewhere. Further, grand jurors and petit (trial) jurors with consciences informed aright are foundational to common-law freedoms. Attorneys from civil-law states sometimes view common lawyers as backward, and even barbarian, because of their willingness to entrust ultimate earthly verdicts concerning life, liberty, and property to a dozen persons untrained in legal matters. The absolute necessity for trial by jury arises to counteract contempt bred of familiarity:

> And the horrible thing about all legal officials, even at best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have gotten used to it . . . .[1730]

In addition, says Lord Justice Patrick Devlin, the Jury deters the ambitions of hopeful tyrants:

> [A tyrant seeks] to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the Constitution; it is the lamp that shows that freedom lives.

The United States Supreme Court has always affirmed the right to trial by jury, identifying it with the common law, "The right [to trial by jury]," says the Court, "is a creature of the common law . . . it cannot be denied by the legislature or judicial decree."[1731]

[1730] G.K. CHESTERTON, *The Twelve Men*, TREMENDOUS TRIFLES 55 (1930).

[1731] *Ex parte* Peterson, 253 U.S. 300 (1920). The Supreme Court is correct in finding that government is without authority to deny trial by jury; therefore, the only one remaining with enough authority to do so is God; there is no indication He has done so. The common law's trial by jury is a specific right, closely defined, and inextricable bound into

Ninth, the principles of Scripture undergirding the common-law tradition have preserved and upheld it. Through the centuries, common lawyers have related the common law's precepts to the foundation of Scripture. The old Roman republic had rested its system of law and government upon the secret Babylonian mystery cults as the patriarchs of each Roman family dispensed them. The Babylonian system, as taught by the Etruscans, later subsumed the patriarchal mystery cults.[1732] Because the Romans—as must all men—derived their identity and that of their government from their gods, who were weaker than even the Romans, their republic disintegrated. In a word, the images of idolatry, which the Romans had made according to their imaginations and fantasies, bound the Romans in false worship. Unable to rise above the weakness of their fantasies, when their fantasies fell, the Romans fell with them.[1733]

Tenth, the common law's distinguishing precepts are as much habits of mind (*lex non scripta*) as written (*lex scripta*), existing first in the thoughts and customs of those impelled by force of conviction to keep their practice. From habit and custom, the common-law courts articulate and apply the rules of law. Just as possessing a Bible does not make a person a Christian; putting common-law precepts on paper—such as, for example, our Constitution—does not produce a common-law country.[1734]

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the American consciousness. Consequently, our organic law assumes, but never delineate, its forms and procedures. Neither Magna Carta nor the Constitution defines or explains the right to trial by jury: Magna Carta uses neither the word *trial* nor *jury*; though the Constitution insures the right to trial by jury, it never outlines its operations. *See* U.S. CONST. art. VI. Historians conclude that the right to jury trial was custom well defined, familiar, and deeply embedded in the drafters' and subscribers of both documents: the right to jury trial was part of their familial identity and remains so with us.

By deft exegesis of Magna Carta's text, one will learn much about the functions of the ancient common-law Jury. *See generally* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852) (exegeting the Latin text of Magna Carta chs. 39 and 40, in light of its historical context, grammar, and vocabulary). The unwillingness of judges to fully entrust the application of the controversial Fugitive Slave Act to the Jury for its approval or rejection prompted Spooner's *Essay*.

[1732] See generally § 2.3 of this book (discussing the Etruscans' academic influence into early Roman society).

[1733] The worshiper will become like unto that which he worships. *See Psalm* 135:18.

[1734] In 1824, Mexico adopted a written constitution similar to the American Constitution. By 1835, about 25,000 American settlers—in reliance upon the Mexican government's liberal land policy and its promise to observe the limits of the Mexican Constitution of 1824—had settled in the Mexican Province of Texas. However, because the principles of the Mexican Constitution were incompatible with the Mexicans' religious-political civil-law culture of concentrated power, the Mexican government refused to observe its constitutional limits. Excepting the settlers Anglo–so the Mexican government called them–in Texas, the Mexican people, being of a long-standing civil-law mindset, never expected their government to observe the limits of the Mexican Constitution. Thus, Mexico's breach of faith offended only the Anglo settlers in Texas:

Such distinguishing habits and customs go to the ultimate concerns of human life; in a word, they rest upon religious conviction worked deep within the soul and mind. Thus, it is said that the benefits resulting from common-law convictions depend on who a people are by the habits, more than upon what written law they possess. The critical mass of a country's religious convictions will determine its mental habits, which, in turn, will determine its customs. That which is written on the hearts of individuals—even if never written in their country's law books—will translate into individual habits of mind and action.[1735]

> The Mexican government, by its colonization laws, invited and induced the Anglo-American population of Texas to colonize its wilderness, under the pledged faith of a written constitution, that they should continue to enjoy that constitutional liberty . . . to which they had been habituated in the land of their birth, the United States of America. In this expectation they have been cruelly disappointed . . . Santa Anna, who, now offers the settlers the cruel alternative, either to abandon their homes acquired by so many privations, or submit to the most intolerable of all tyranny, *the combined despotism of the sword and the priesthood.*

DAVY CROCKETT'S OWN STORY 352–53 (Konceky & Konecky, n.d.)(1836)(emphasis added).

The Mexican government's neglect of her Constitution became a flash point of contention between the government and the American settlers in Texas. Because the Mexicans saw their Constitution of 1824 only in the abstract; practicing its principles proved unattainable, as it is in other long standing civil-law cultures:

> [T]he democratic theory of sovereignty has proven unexportable to Viet Nam, granted that it might be desirable in the abstract. The people do not understand it, do not want it, and could not make it work if they had it. Most of the peoples of the so-called third world who, in forming nations, expected to be truly free now that they were rid of the old colonialism find themselves instead being ruled by native military or party dictatorship.

ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 53 (1974). The American ideals of law and government will also prove un-exportable to Moslem nations, so long as the individual members of those nations remain entrusted to Mohammed. The common law is incompatible with Islam, as also Islam is incompatible with Scripture. "Remember," said Clemet Mok, "the music is not in the piano." So also, freedom is not in the Constitution or the Constitution's backbone: the common-law tradition. Just as the piano is the instrument that the piano player uses to give expression to the music in him, our Constitution is the instrument one uses to give expression to one's convictions of law and government, i.e., "to secure the Blessings of Liberty to ourselves and our Posterity . . . ." U.S. CONST. preamble (capitals in original).

[1735] Likewise, possessing a copy of the Bible does not make a person obey its precepts, but the mental habits it gives to those who become intimate with its precepts will yield fruit. *See John* 15:7–8. The truth aims not at reformation of one's mind, but instead, provides a new mind: the mind of Christ whereby one thinks God's thoughts after Him.

§ 5.3.2
From General Principle to Specific Application

When God gave the principles of the law at Sinai, he never gave every possible application according to every issue that would bob forth from the flux of human relationships. Rather, He left the specific applications of his unchanging principles to men, according to *stare decisis*.

About thirty-eight years after God gave the law at Sinai, the four daughters of Zelophehad, Mahla, Noah, Hoglah, and Milcah, came to court before Moses, Eleazar, Israel's leaders, and the entire congregation with their petition in equity. They made it short and to the point; lucid and in order, they let it stand. *First*, they testified, laying the foundation of relevant facts: that their father Zelophehad had died of his own accord ("in his own sin"[1736]) in the wilderness, but not in Korah's treason against the LORD, but without any sons. *Second*, they presented before the court the question to be decided: "should the name of our father disappear from among his kin because he has no son?"[1737] *Third*, they stated their request: "give to us a possession among the kin of our father." Moses sought to find the answer before the LORD, who affirmed these daughters' claim, holding that they can share in the inheritance from their father. The LORD went on to give specific guidance in cases of inheritance, where a man had no sons but only daughters.[1738]

The principles of the law never change, but the persons and circumstances subject to the principle do change and require fresh application. "Beloved, I write no new commandment to you, but an old commandment which you have had from the beginning. The old commandment is the word which you have heard."[1739] Speaking of the same commandment, John then refers to it in its fresh application: "Again, a new commandment I write unto you . . ."[1740] Zelophehad's Case (1440 B.C.) affirms stare decisis, the pole star of the common law, calling the finding a *statute of judgment*.[1741] "[It] is the earliest recorded case, said Justice Edward Coke, "which is still of authority." In 1920, Sir

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[1736] Hebrew: בחמאו מת (*va-ke-taho mayth*).

[1737] *Numbers* 27:4. The Hebrew verb translated *disappear* is from the root גרע (*gara*), meaning to shear away or shave off.

[1738] *Numbers* 27:7–11.

[1739] 1 *John* 2:7.

[1740] 1 *John* 2:8.

[1741] לחקת משפט: by the letters, meaning a standing, or permanent, judgment, meaning, this finding binds courts in cases following on like facts.

Frederick Pollock, discussing Coke's view of Zelophehad's Case, called it good law, standing for two principles governing succession: *stare decisis* and the next-of-kin principle of inheritance. [1742]

§ 5.3.3
Common Law's Five Facets

Discerning the kind of relationship between litigating parties is a threshold question in common-law legal conflict; therefore, an understanding of the common law demands clear identification of its fundamental relationships. Charles Rounds disagrees with Fredrick W. Maitland's and Austin W. Scott's presupposition of "only two fundamental legal relationships: contract and property." The common law, says Rounds, comprises five fundamental private relationships, forming its distinct facets: property, contract, agency, trust, and tort—a complete volume of law:[1743]

> In addition to tort, our [common law] legal system does not have two fundamental private legal relationships. It has four, notwithstanding what the scholars may say: They are the agency, contract, property (legal interest), and the trust. There are four because four are needed. No one is sufficiently elastic to encompass another without turning into the other. They are facets of the legal gem we loosely call the common law.[1744]

Because the foundation of the common-law is relationships as opposed to the will of the state, the common law's first principles arise from an understanding of its five private relationships. These five facets of the common law are five faces of the same gem: distinct, yet interdependent in practice. Though one must distinguish the five faces, one will seldom view them in isolation. To understand these five legal relationships brings an understanding of their interdependency; it is to know the common law. "To avoid legal misdiagnosis . . . ," says Rounds,

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[1742] The foregoing quotes of Edward Coke and Frederick Pollock are according to Barrister-at-Law and Rev. Francis Nigel Lee, Professor of Systematic Theology, and Caldwell-Morrow Lecturer in Church History at the Queensland Presbyterian Theological College, Brisbane, Australia.

[1743] The common law of crimes concerns the individual's relationship with the state.

[1744] ROUNDS, *supra* note 363, at 698. Rounds adds, "For purposes of this section the term *common law* encompasses the law of equity." *Id.* at n.20.

"counsel needs to *know* the common law, not know *about* the common law."[1745] To become familiar with these relationships is to lay the foundation of understanding for knowing the first principles of the common law. The common-law categories of law are best defined and understood by comparing them to demonstrate their likenesses and contrasting them to reveal their differences.

An agency relationship arises where one person (called the principal), gives authority to another person (an agent) to act on his behalf, requiring the agent to look out for the interest of his principal.[1746] A contractual relationship arises where parties each promise to provide reciprocal benefits, while each looks out for his own interest. A tort arises where one person unlawfully trespasses upon the rights of another, negligently or intentionally. Property is one's right in a thing to the exclusion of others, whether that thing is tangible—such as the right to use and enjoy property real (land) or personal (chattels); or intangible—such as the right to speak, to act, to enjoy relationships (the right to association), or to privacy (the right to not associate, disassociate, or reveal information). The trust relationship arises where a trustee holds title to property for the benefit of another. Each of these five relationships calls upon principles of the other four, with "the trust relationship being the most complex arrangement of these relationships."[1747]

[1745] *Id.* at 705 (italics in original).

[1746] The phrase *free moral agent* is a contradiction of terms. An agent, by definition, is not free: the covenants and directives of his agency contract restrict his authority. Where an agent acts outside the scope of his agency, he has no authority, i.e., he acts without the agency. The authority of his agency depends upon his obedience to his principal: the one having given him authority. Although by disobedience, a person acts outside the scope of God's directives, God has forbidden him to do so. To act outside of God's directives is to outlaw one's self and to forfeit the protection of God's law. The very act of obeying God's directives is to exercise God's agency and place one's self within the scope of God's protection. "The servant hath no more authority," says Rutherford, "than the master giveth; but the king, in lawless commandments, gave nothing royal [lawful] to his cut-throats, and so nothing legal." SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 175 (photo. reprint 1982) (1644).

[1747] *See* F.W. MAITLAND, SELECTED ESSAYS 129 (1936), *quoted in* 1 SCOTT ON TRUSTS § 1. The trust, says Maitland, is the greatest achievement of English jurisprudence. "I think it might be said that if the Court of Chancery saved the Trust, the Trust saved the Court of Chancery." F.W. MAITLAND, SELECTED ESSAYS 157 (1936). The common law of trusts weds the concepts of law and equity and has the attributes of agency (trust agreements are either contractual or merely consensual) and property (which includes contractual rights). The trust relationship is the most complex weaving of fundamental relationships in the common-law tradition. *See, e.g.*, Charles E. Rounds Jr. & Andreas Dehio, *Publically Traded Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & BUS. 473 (2007) (providing a cutting-edge comparison, contrast,

To divide any of the five faces of the common law's volume is to disfigure that face and alter the common law's shape, thereby deforming its symmetry and disturbing its balance. In addition, division of any one of these five facets will only make a subspecies of that divided facet having more likenesses to that facet before its division than differences to the remainder of that facet from which it is divided. Therefore, further division of these five facets, for purposes of study or litigation, is unnecessary and confusing. Moreover, to merge any of the common law's five facets will disfigure the body and shape of the gem, making it appear incomplete. As are the faces of Ezekiel's vision, each facet of the common law is indispensable to its integrity and its balance.

No amount of legislation will replace or erase the common law applicable to our needs. When adjudicating statutes, a true common-law court will always fall back upon the first principles of the common law's five facets because legislators cannot speak prospectively to every issue that will bob forth from the flux of human relationships:

> [T]heir is . . . a residual power, where no statute has yet intervened to supercede the common law . . . such gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society . . . I say my Lords, if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful . . . .[1748]

To fill the gaps inherent in legislation, common law provides fixed, court-fashioned standards called rules of law.[1749] For example, where legislation fails to define matters such as informed consent, confidential information, and ministerial acts, common law gives simple definitions. Thus, the common-law outlawing of fraud, deceit, and misrepresentation will always be with us as well. Since the politics of popular perception—whether intended for right or wrong and with all its unavoidable disingenuousness—drives legislators, legislation is often inconsistent with its own pronouncements and with proven and established common-

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and analysis of the common-law trust used to conduct business and investments and its civil-law analogs). Charles Rounds Jr. teaches at Suffolk University School of Law in Boston, Massachusetts; Andreas Dehio teaches law at the University of Heidelberg, Germany.

[1748] Viscount Simmons before the House of Lords *in* Shaw v. Director of Public Prosecutions [1962] A.C. 220.

[1749] See generally § 4.5 of this book (discussing the rule of law as a common-law ideal).

law principles. Where legislation attempts to redefine the five facets of the common law, it blurs distinctions; by sowing the legal landscape with political jargon that courts must sort out and define for the public, it fosters confusion and bewilders. Statutes, said Lord Mansfield, breed unexpected inconvenience.

Legislation that claims to alter a common-law rule of responsibility required of one's relationship by shifting legal liability from one person to another or by abrogating it altogether, works injustice. For example, a sweeping legislative attempt to remove bank liability in its third-party relationships, fails to remove liability in all cases;[1750] legislation will never end the necessity for *caveat emptor* (buyer beware): the common-law principle of individual responsibility in contractual relationships. With God's dispensing of individual authority, He also dispenses individual responsibility—the two being inextricable. Those findings of the common law that time has proven immutable show that it is impossible for men—whether by the single will of a commanding assembly of men (a legislature) or a single dictator (the legislator)—to shift divinely fixed rights and responsibilities from one party to another.

§ 5.3.4
Common Law —*vs*— Republican Forms

The Framers of our Constitution continued the ideals of common law held in Anglo-Saxon England, later stated by Magna Carta under the leadership of Steven Langton,[1751] and tempered through experience. Our American tradition of law and government, therefore, is not a never-before-tried theory. Though defenders of the common-law tradition have referred to the ancient Greek writers to bolster their arguments, the common law has neither descended from the Greeks nor did the Founders model our government on the Hellenistic, city-state theory of republicanism:

[1750] *See* Patrick v. Union State Bank, 681 So. 2d 1364 (Ala. 1995).

[1751] Significantly, Langton drafted Magna Carta in the same year Rome declared the doctrine of transubstantiation (1215). It is likely that Steven Langton, drafter of Magna Carta, also provided the Bible's present chapter divisions. Robert Stevens then added numbered verse divisions to the Bible text, which appeared in the Geneva Bible of 1560: the English Puritans' preferred translation. Cromwell's troops carried the Geneva Bible into battle; the Pilgrims carried it to America; Shakespeare quoted from it some 5000 times; and consequently, by its popularity, its chapter and verse divisions became universal.

> The Framers of our Constitution were born and brought up in the atmosphere of the common law, and thought and spoke its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and administration of many of them; but, when they came to put their conclusions in the form of fundamental law in a compact draft, they expressed themselves in terms of the common law, confident that they could be shortly and easily understood.[1752]

"The language of the Constitution," said Chief Justice Taft, "cannot be interpreted safely except by reference to the common law . . . ."[1753] The Founders, however, confronting civil-law doctrines then afoot in Europe, sometimes referred to our form of government as a *republic*,[1754] using this term because of its popularity during England's struggle with the Crown over a century earlier.

The American Colonies' were intent upon setting English common-law foundations; their aspiration embroiled them in a life and death struggle with England, the mother country. Many of them were down on anything labeled *English*. Thus, the phrase "*English* common law" raised misplaced disgust among the Colonials against the common law, the very ideals for which they were fighting to keep. A few decades later, in early nineteenth-century America, resentment against all things English—especially the common law—fostered an emotionally charged political faction out to banish the common law from the United States.[1755] Due to the Colonials growing distaste of all things English, the word *republic* became preferred to "English common law" or even "common law."

Though there are differences of opinion as to what a republic is,[1756] most agree that "republic" describes a certain form of government, but

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[1752] Ex parte Grossman, 267 U.S. 87, 108–09 (1925).

[1753] *Id.* at 107.

[1754] See generally app. 9 of this book (discussing seventeenth-century England's understanding of republicanism).

[1755] See generally § 3.11 of this book (discussing early eighteenth-century attempts of state legislatures in the United States to end the common-law tradition). Attempts to supplant the common-law tradition with the civil-law Code emerged from New England's incipient existential elitist. The results of this movement fomented war between the North and the South and demanded the post-war military occupation of the South.

[1756] The Latin term *republic* is conjoins *res*, meaning "a matter of" (genitive case), and the root *publica*, meaning "the public" (the people), resulting in "a matter of the people": by extension, "the people's business" or popular sovereignty. The ancient Greek city-states took up this republican idea in their political theory; after Rome subdued the Greeks militarily, the Greek's culture of popular sovereignty overcame and destroyed Rome. *See*

not its workings. Loose usage has obscured the term; nowadays the word *democracy* replaces the term "republic."[1757] Men have used "republic" to describe representative and non-representative forms of government; the Greek and Roman forms were non-representative. Judging from history, a republic is a nation claiming sovereignty for the people without defining what that means, while allowing a chief-of-state or a body of representatives—elected by a majority of the people or appointed by the chief-of-state—to define the meaning of *republic*.

Will a republican form of government, standing alone, secure our lives, liberty, and property? The experience of history answers: "No." If the state lodges unlimited power in itself—in one man as chief-of-state, in a single body of men (whether 10 or 10,000), or in a majority of *the people* (however defined)—tyranny will eventually rear up against the law-abiding that disagree with the powerful faction. In such cases, majorities, through their elected representatives, or through a single demagogue, will usurp the place of God by claiming the power of final arbiter of right and wrong.[1758]

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generally Gary Amos, *The Philosophical and Biblical Perspectives that Shaped the Declaration of Independence* in THE CHRISTIAN AND AMERICAN LAW 49–82 (H. Wayne House ed., 1998) (demonstrating that America's roots are not directly connected to Greco-Roman Hellenistic political theory).

Because popular sovereignty is the basis for both Greek republicanism and democracy, the terms are synonymous. The popular press, by calling the United States a *democracy*, refers to popular sovereignty; the moderate press, seeking foremost acceptance by the greatest number, have coined the redundant compound *democratic-republic*; those revolted by popular sovereignty, insist upon *republic*. Respecting the United States, however, all three are wrong. We rightly describe our ideals of law and government as those of common law.

Mere mention of the word democracy sent chills through our Founders because it reminded them of French republicanism's godless horrors. Between the terms democracy and republic, "republic" comes closer to describing our American tradition of government because likenesses of form do exist between the American common-law tradition of government and republicanism.

Democracy has become a hackneyed word. "Even educated Americans seem to be confused about democracy . . . and complacent in their ignorance. When I ask my learned colleagues about democracy . . . [s]ometimes they simply point to the Constitution of the United States . . . ." PAUL WOODRUFF, FIRST DEMOCRACY 4 (2005). Though Woodruff craves Greek democracy, he refuses to impute it to the Founders or force it upon the Constitution, in any degree. "The Constitution is a magnificent solution to the problems faced by the Founders but it is not democratic . . ." *Id.* "There is no general agreement" states Culver, "even on what democracy is." ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 52 (1974). Nowadays, popular talk has inflated the word *democracy* like a balloon that upon probing bursts, leaving only the memory of a sound.

[1757] The Constitution's reference to republican government refers to form, not substance. *See* U.S. CONST. art. IV, § 4.

[1758] See generally § 5.1.5.5 of this book (distinguishing the common law's separation of powers from the civil law's doctrine called separation of powers and confirming separation

In other times and places, people have instituted common-law-like forms of law and government, claiming that unlimited sovereignty is in *the people*—a claim inconsonant with Scripture and with the common-law tradition—and calling their governments republics. Such republics were foregone to anarchy and degenerated into democracies demanding tyranny to bring order.

In general, republican forms of government have been those recognizing supreme power in its citizens,[1759] but settled for a simple majority of them controlled by a few elitist. Such was the French Republic,[1760] the Soviet Socialists' Republic, and such is the People's Republic of China. Bloodshed in these republics-so-called has equaled or surpassed the horrors of Nazism. The Roman maxim revering popular opinion, "The voice of the people is the voice of God," still echoes. At times, popular opinion and political correctness can express truth, but only in the sense that a broken clock with stationary hands shows the right time twice every twenty-four hours. In sum, evidence shows that a *republican* government is not the government best calculated to bring freedom.

Correctly described, our law and government are of the common-law and not of any republican ideal. Accordingly, the Creator, not *the people*, is the fountain of authority to whom each person is foremost responsible, including those serving in government. God dispenses His authority direct to each person. In the common-law tradition, by this derived authority, individuals acting together, appoint certain of their own number to their service in government, entrust them with authority, but keep them at the advice and consent of the governed. By contrast, a republic, as the Greeks fashioned it, is in the civil-law tradition: *total*, acknowledging no authority above state power embodied in certain men chosen to be the final measure of all things. On the other hand, common-

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of powers in the common-law sense as a remedy against tyranny, including a legislature's tyranny).

[1759] In the republican tradition of the Greeks and Romans, citizens (*civitas*) were only those dwelling in the Greek's *πολις* (*polis*) or city; the civil law excluding all others from participation in government. "Etymologically *ius civile* denotes the law of a given *civitas* or citizens [those belonging to a city]." BERGER, *supra* note 236, at 527.

[1760] Montesquieu was a republican in the Greek sense, Thus, he used the terms *democracy* and *republic* interchangeably, advocated the "common ownership of property as in the republic of Plato," and praised Lycurgus, the legislator of Sparta, for removing hope of material reward for ambition, giving "natural affection . . . no outlet because a man was neither son, husband, nor father." "The state," said Montesquieu, "instead of citizens, establishes commerce."

law government is of limited authority as a legal matter and of limited power as a practical and political matter.

Because each of those governing are responsible not only to God and to the common law, but also to the governed—, common lawyers have said our common-law government is *political*, as opposed to regal or imperial.[1761] Further, common-law ideals demand that those governing enforce only that which they also have obligation to obey. In addition, our common-law tradition rests upon independent judges and independent jurors standing between the accused and the state, holding authority over the facts of a case and, if need be, holding power to check the executive's, the legislature's, and the court's application of the law.[1762] Moreover, an independent judge will refuse to close ranks with his fellow judges to protect a judge that has stepped outside the scope of his authority and abused power under cover of his judgeship.

The common-law tradition does not hold that every detail of republicanism is harmful, but does recognize the *fundamental superiority* of the common-law tradition over Greek republicanism, providing greater stability for a country through individual freedom and dignity. For example, though the political aspect is a part of both republicanism and the common-law tradition,[1763] the two rest, nonetheless, on distinct and different political ideals: republicanism's

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[1761] *See* FORTESCUE, *supra* note 59, at 25.

[1762] See generally §§ 4.3.2.3–4.3.7 of this book (explaining the common-law right to trial by jury as the Anglo-Saxons practiced it and as Magna Carta affirms it).

[1763] It is impossible to rightly define the common law by identifying it with any set of rules in force at any time in history. The common law is not a list of statutes or rules. Rather, it is a right-headedness that seeks out the threads of first principles running through previous case opinions, and then takes these for its presuppositions in future cases. In addition, built into the character of the common law are the processes that allow it to recognize in other traditions that which reinforces its own uncommon fundamentals, while rejecting that which does not. The common-law has identified its ideals of law and government with the Scripture's ideals of law and government.

Before the collapse of the Soviet communist block, civil lawyers in communist countries attempted to distinguish their system from both the civil law and the common law traditions. Communist lawyers boasted that—unlike other civil-law systems and the common-law tradition, which embody but fail to declare their ideals—the communist system of law and government unambiguously states its ideals. To communist lawyers, "both the civil law and common-law traditions are subject to criticism because they embody, but do not clearly state, their ideologies." MERRYMAN, *supra* note 82, at 4.

Bold assertions of ideology have their place; such certitudes of legal scholarship's assured results, however, will never assure the reliability of the matters certified, as history has now revealed. Simply put, the proof of a matter is not in the declaration of it; certitude is not the test for certainty. The proof is in the results (the puddin'); the Soviet communist block has fallen.

fountain of political authority is man; common law's fountain of political authority is the Creator.

The common law's ideals form its foundations. These ideals, and the bedrock upon which they rest, distinguish the common-law tradition from republicanism. Rebellion at Babylon spawned the humanistic seeds of republicanism, which developed in the Greek city-states, advocating a total state dependant upon men alone. The Creator, however, implanted the seeds of the common-law tradition in the yearnings of each person, which demands, in trust of God,[1764] limited government.

§ 5.3.5
Democracy:
Tyranny's Lurking Place

Then the LORD said unto Samuel:
Hearken to the voice of the people for they have not rejected you,
but they have rejected me from reigning over them.[1765]

"[D]emocracy," says Justice Story, "has many striking points of resemblance with tyranny. The ethical character . . . is the same; both exercise despotism . . . and the decrees are in the one, what ordinances and arrets[1766] are in the other."[1767] Unlike democracy, the common law is not a tradition resting for law on superior numbers. The use of majorities is sometimes necessary in law and government, but unless

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[1764] *See Matthew* 7:24–29. With these verses, Christ concludes His Sermon on the Mount, teaching that stability is possible only as far as one observes God's Word. This passage teaches that the Word of God is the only possible steady base upon which a man can plant his foundations. Indeed, the Word of God is the πετρα (*petra*: in geological terms, rock *in situ*, viz., bedrock, as distinguished from a single rock or stone) used as one's foundation. Because Christ distinguishes *petra* from *petros* (πετρος: a single rock or stone—broken loose from bedrock or *petra*—, detached, moveable, and small enough to be picked up and thrown by hand) in *Matthew* 16:18, one must conclude that He well-knew the distinction between the two term and used both with precision. Peter was the loose and rolling stone (*petros*); whereas Christ is the immovable bedrock, the Rock of Ages, the foundation that no man can lay. *See* 1 *Corinthians* 3:11.

[1765] 1 *Samuel* 8:7. Without biblical faith, corruption of the heart will bring confusion of mind, producing weakness of the conviction that concedes to the will of the majority. "[I am] so skeptical as to our knowledge of goodness and badness of laws," said Justice Oliver Holmes, "that I have no practical criticism except what the crowd wants." The majorities of democracies, however, never set the individual free, but rather binds the minority with the majority's will. Truth does set the individual free; God's Word is truth. *See John* 17:17.

[1766] *Arret*: French civil-law term for "decree."

[1767] STORY, *supra* note 89, at 327. "Aristotle, in ancient times, upon a large survey of republics of former days, and of the facile manner, in which they had been made the instruments of their own destruction, felt himself compelled to melancholy reflection." *Id.*

there is a final check on majority power, majorities will oppress minorities, impede freedom of association, suppress ideas, and deny individual rights in general. The fundamental theory of civil law and government remains unchanged, whether labeled *democracy* or *dictatorship*: the state as legislator is sovereign and admits of no appeal. During Rome's earliest days, law was by the single will of a majority of a select few holding the power to vote. Later, as in the Babylonian tradition, law in Rome's empire was legislation by the single will of one man, the emperor.

Nowadays, in most civil-law states, a majority of the people lodge power in the majority of a legislature upon whom the majority of the people trust for law making and to control the courts. However, legislative rule by majorities from which there is no genuine appeal—viz., democracy—is the lurking place of tyranny. Such was the lesson the American Colonies-turned-states learned after American independence. Civil law takes care to foil anything that compromises the power of the legislative majority to command others. Consequently, civil law abhors the common-law limits on legislative power, such as the right to trial by jury, because it enables a lone juror to stop the political majority from having its way in individual cases.

Where the will of the majority is the final power of law and government, the majority will weild tyranny against the minority. Greater numbers, however, have no inborn or divine right to rule over smaller numbers. Scripture exhorts to never despise small things and provides no hint of an example in law or case history that justifies greater numbers of people ruling smaller numbers. On the contrary, God said that Israel, though a small nation in comparison to other nations, held certain superior privileges and responsibilities. Further, God has said that courts and judges are never to respect the great (privileged, whether by sheer numbers or otherwise) over the small (unprivileged) in judgment.[1768] To hold that majorities have a right to rule because they are of greater numbers or power is to hold that the crowd knows best, might makes right, and that authority flows from power instead of power being upheld by authority and *right*.

No one has ever shown that the majority, by its character or its numbers, insures justice. Moreover, it is false to think that opinions held by the greater number of people indicate even a probability that the opinion of the majority is right, and, therefore, the majority will has

[1768] *See Deuteronomy* 1:17.

superior right over the minority. Scripture is clear, "The wide gate and the broad way lead to destruction, and many are the ones rushing headlong through it; the narrow gate and the narrow way lead into life, but few are the ones finding it."[1769] In addition, history's lessons are just as clear: majorities are untrustworthy. The presumption that the majority opinion on any single question is just as likely wrong as right ought to begin one's evaluation of any position of a majority.

In politics, success depends upon the majority will; capture of the human will is easiest through manipulation of outrage. Consequently, campaigns to incite outrage become the focus of majority rule; truth being unnecessary to such campaigns, it finds little place. To capture the consent of the majority is also to capture the wealth of others. Politicians spend much time conspiring with others to gather superior numbers to enact legislation that takes wealth—by direct or sometimes indirect means—from the pockets of one group and places it in the pockets of another.

The record of history rings clear; the pervasive drive of differing groups to exploit the principle of majority rule to plunder one another is the unavoidable preoccupation of politics. Thus, law and government wholly dependent upon majorities must degenerate into political plunder. Ultimately, however, the Bible teaches that greater numbers will fail; the moral force of the few will prevail. In summary, the notion that majorities have superior rights must also hold that minorities have inferior rights. Thus, under notions of democracy, majorities in deed determine the rights of minorities.

Because absolute rule by any faction, great or small, amounts to tyranny of some over the rest, the Anglo-Saxons knew that for England to willingly submit to the same laws, those laws of necessity must proceed from a source[1770] other than a faction of that country's people. Though their law recognized that voting was, at times, the beginning point for the discovery of legal standards and their application, jury unanimity, not majority rule, provided finality for legal disputes arising out of particular relationships. "[N]othing is more treacherous . . . subject as it is to passion, to fallacy, and to the inability to grasp general notions or to

[1769] *Matthew* 7:13–14.

[1770] The investigator experiences the purity of law's source only as he traces law back to its fountain. In order to discover truth having no admixture of error, one must hark clean back to the source of all truth: God as revealed by Scripture. To acknowledge God's Word as supreme is to acknowledge God as supreme. *See Psalm* 56:10–11, wherein David reveals that to be in praise of God's Word is to be in praise of God because God is the pure fountain of His Word.

distinguish the essential from the inessential,"[1771] than is law by popular vote.[1772]

It is indispensable to the keeping of individual freedom that the minority always holds the right and power of nullification over the acts of the majority that encroach upon fundamental God-given rights. Indeed, a country must reckon with the power of the majority, but God means that authority and the freedom to exercise that authority is first to the individual and not to political majorities. If freedom is not first to the individual, it is non-existent for mimority associations of individuals.

Because legislation is the product of dominating opinion or power, standing alone, it is contrary to freedom; thus, freedom entails courts independent of the legislative power. Where legislation is supreme, as in civil-law states, government license (permission) supplants liberty: divine authority granted direct to the individual to speak and act. Though majorities often win out, such never need be. "It does not require a majority to prevail," said Samuel Adams, "but rather an irate, tireless minority keen to set brush fires in people's minds."

§ 5.3.5.1
Majority Power Over the Courts

It is the ambition of some to strip of judicial power judges with whom they disagree by lending (in theory) trumping power to *the people* through the popular legislative will. To do so, however, in hopes of ending judicial tyranny is fantasy. History reveals that the popular will—

[1771] C.K. ALLEN, LAW IN THE MAKING 387 (1964).

[1772] Rule by popular opinion will bring a people to the same end: confusion and tyranny. The corruption of the human heart gives inevitable rise to confusion of the human mind. Only God's standard, therefore, individually discerned and applied, is fit to be the final rule against which to measure all attempted human expressions of law. All law has a giver; law's stability depends upon the purity and wisdom of its giver.

Greater voter participation will never enhance a country's strength and stability absent more understanding and participation in our courts as jurymen and litigants. Stability comes as individuals resolve their differences as private matters in the courts, not as they seek to gain their private interest by invoking the state power through popular vote.

By 1924, emphasis on voting reached such a pitch in Australia that Australia's Parliament criminalized failure to vote in federal elections. By so doing, Australia has demeaned the free exercise of a precious right, to the status of enforced coercion, such as wearing a set belt. Moreover, it lays undue emphasis upon popular politics, eclipsing those opportunities to do justice as a grand or petit juror by conclusively barring the power of the state against the life, liberty, or property of another. Making criminal the failure to exercise the right to vote is as senseless as making criminal the failure to exercise freedom of speech or association. Just as freedom of speech and association include freedom to not speak (silence) and non-association; so also, the right to vote includes the freedom not to vote.

i.e., the majority will—is inconsonant with God's revealed character more often than consonant with it. History further demonstrates that the popular will is more dangerous than activist judges and that the single will of an unbridled legislature will oppress. Thus was the lesson—lest we forget—learnt under absolute rule of Parliament and its tyranny, remedied by inviting William & Mary to the throne, whose administration became a model in forming of the government of the United States under the Constitution. Legislative and popular power at the expense of an independent judiciary will result in legislative control of the courts: civil law's goal.

To be sure, even though common-law courts have neither the legislature's power of the purse nor the executive's power of the sword, the judgments and enforcement power of the courts are sometimes unlawful. Individual jurors that understand their common-law responsibilities remain the ultimate remedy for judicial tyranny. Use of the Jury, therefore, must increase, not decrease. The answer to lawless judges is the lawful Jury.

The late eighteenth-century French revolutionaries induced and then exploited the fear among the people that, judges, unless stopped, will always meddle with the popular (majority) will of *the people* by overturning representative legislation and the referendum. This fear brought about French adoption of Rome's Code as the *Code Napoléon*, which enabled Bonaparte's tyranny through control of the courts, plunging France deeper into a mindset that yet clings to her national character. The dominant fear among the civil-law elite remains that the courts will meddle with the legislative will. Consequently, civil-law states relegate their judges to mere employees of the civil-service ranks: clerks confined to enforcing the will of the state from which there is no appeal. Such dependence of judges is a foundation stone of civil-law government.

On the other hand, fear of the judiciary was never the driving force to American Colonials during their War of Independence because the Americans were accustom to courts operating in the common-law tradition: independent of the legislative and executive powers. "When the Constitution was drafted," says Richard Hamm, "American society was infused with common law ideas . . . The revolutionary experiment heightened Americans' adherence to common law, especially to the idea that the principles embodied in the common law controlled the

government."[1773] True common-law courts will never be rubber stamps for the legislation of royalty, a dictator, or any ruling elite.

In our own day, the demand that courts must never make law but only interpret it, is popular. Taken in its common-law sense, the power to interpret means that the courts alone hold the power to apply the law in particular cases. Taken, however, in its civil-law sense, it becomes jargon meant to rile the same revolutionary fear France's elite fostered during the French Revolution: that the courts will overturn the popular representative will and that this popular will is favored as trustworthy. As undesirable as court opinions sometimes are, the right remedy is not sovereign legislation under the banner of democracy and popular will.

History is incontrovertible: if legislation becomes supreme, the legislator becomes supreme; the selfish passions of the few will translate into the political passion of the majority will and the legislator's command; oppression will smother practical freedom. Most of the world lives under the delusion of the supremacy of "majority will" legislation, unlimited by higher law. Neither legislatures nor the courts are supreme. Both have proven useful within defined limits, but untrustworthy, standing alone. Each, therefore, is to serve as a check upon the other; the common-law juror is to serve as a check on both of these and on the executive power.

The constitutional arrangement intended between our federal, legislative, and judicial powers is the ideal of the common law. Under the Constitution, the inferior federal courts, unlike the Supreme Court, are creatures of Congress: "The judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish."[1774] The Constitution thus also empowers Congress to grant or deny subject-matter jurisdiction to inferior federal courts, leaving the unlimited jurisdiction of state courts to adjudicate those matters. The Constitution having thus empowered Congress to remove judicial authority, intends that complaints of federal judges' judicial overreaching incite moral outrage (the greatest political motivator) that brings, first, removal of subject-matter jurisdiction from the federal courts, and if that fails to remedy the overreaching, second, impeachment and removal of the judge from the bench.

In summary, if Congress disagrees with the decisions of lower federal courts on any matter, it holds authority to withdraw those federal courts'

[1773] Richard F. Hamm, *Common-Law Court*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1992, at 171 (Oxford, 1992).

[1774] U.S. CONST. art. III, § 1 (capitalization, and lack thereof, in original).

jurisdiction to hear disputes concerning that matter. Congress's removal of jurisdiction of particular subject matters from the federal courts will boost business in the state courts were judges and jurors will apply local sensibilities; while the United States Supreme Court, nevertheless, retains appellate jurisdiction over constitutional questions.[1775] Congress's increased removal of subject-matter jurisdiction from the federal courts, will unclog their dockets, resulting in—for the first time since the unconstitutional swelling of the federal criminal-law industry—federal defendants' real expectation of enjoying their constitutional right to a speedy trial.[1776]

§ 5.3.5.2
Jury Veto of the Majority Will

To insure the rightness of the laws as applied in particular cases, the common law has developed its jury tradition[1777] whereby twelve individuals drawn by lot as a representative sample from the whole number of a locality, have authority to veto majority-driven legislation,

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[1775] Congress, however, holds the power of regulation over the Supreme Court's appellate jurisdiction. *Id.* art. III, § 2.

[1776] *Id.* amed. VI.

[1777] Long before Magna Carta, and even the Anglo-Saxon invasion of Britain, the Teutonic tribes had established the right to trial by jury, which persisted on the continent until the Reformation. Two hundred years before Magna Carta, the laws of the German King Conrad insisted upon the ancient folk law's trial by jury:

> In Magna Carta [trial by jury] is more than once insisted on as the principal bulwark of our liberties; but especially chap. 29. That no freeman shall be hurt in either his person or property, "*nisi per legale judicium parium suorum vel per legem terrae*" [unless by the lawful judgment of his peers, or by the law of the land]." A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years before: "*nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum*" [no one shall be deprived of his property, but according to the custom of our predecessors, and by the judgment of his peers].

3 WILLIAM BLACKSTONE, COMMENTARIES *350. Conrad's eldest son married the daughter of Chanute, the first Danish King of England (1016–1035). In the foregoing passage, Blackstone uses the word "privilege" (mere permission) to signify the *right* to trial by jury (as though Jury trial is available only at the pleasure of the government). Such confusion of the terms *privilege* and *right* is detectable in the modern legal community and court opinions, but one must guard against it because if the courts call a *right* a mere privilege long enough, the right will be treated as mere permission given. For example, the United States Supreme Court often refers to the privilege of the Fifth Amendment instead of the Fifth Amendment *right* to remain silent. Weak words erode rights.

or other claimed standards, as applied in particular cases. Moreover, the authority of a lone juror justifies his exercise of this veto power, halting any majority within the Jury bent on allowing government to act against a defendant. Further, if such a lone juror is persuasive enough to convince eleven other jurors to his point of view, he will thwart criminal conviction of the accused and all the consequences of conviction. In short, the common-law Jury have veto authority in fact over the power of the legislative majority.

The traditional trial Jury are an all-or-nothing panel: in the true common-law Jury, majorities have neither authority nor power.[1778] By the Jury, a country holds veto power, in individual cases, over the enforcement of any law the majority has enacted, either direct by referendum or indirect by its legislators. The Jury are indispensable in limiting the majority will because it is impossible, as a practical matter, to convene the whole people of a locality or to ask the whole of a people to devote their time and attention to police the activities of government. The common-law Jury has proven the most trusty and yet inexpensive means of justice ever devised.

In summary, in common-law countries the application of any law in individual instances stands or falls upon the consent of the Jury. The power of the Jury to return its verdict contrary to majority driven standards, such as legislation, no more allows jurors to legislate than the President's veto of the acts of Congress allows him to legislate. It does mean, however, that the Jury has the power to refuse application of the majority's will in particular cases, if it believes such application is unjust. In such cases, the Jury will instruct the majority to go no further.[1779]

[1778] The verdict of the common-law Jury trumps democratic power. The true Jury never operates by democratic principle. It neither arises from a majority nor reaches its finding by a majority. Rather, selection of jurors is random; its verdict requires unanimity: a lone juror's dissent overcomes all other jurors. Though courts have eroded the unanimity of the Jury in non-criminal cases, a mere majority of the Jury for conviction in criminal cases is unconstitutional. *See* Apodaca v. Oregon, 406 U.S. 404 (1972). In some common-law jurisdictions, in non-criminal cases, the courts, with consent of the legislature, allow jury verdicts by a super majority of jurors, if all parties to the litigation agree to it.

[1779] The common-law Jury, says Blackstone, are a representative sampling of all elements of a *country*.

§ 5.4
Summary of Major Distinctions:
Common Law –*vs*– Civil Law

I.

COMMON LAW—Law binds government officials and employees. Traditionally, judges arise from private practice; the law honors judgeships because their authority is independent of the executive and legislative branches and in equal dignity with them. Judges have the additional duty, by their opinions, to dissuade the other branches of government from exercising unlawful power. The courts publish minority (dissenting) judicial opinions with their majority opinions.

CIVIL LAW—The law does not ultimately bind the state, its officials, and its employees. Judges arise only from the civil-service ranks and remain in the civil service ranks. Thus, judges are career government employees beholden to the will of the state for their jobs and pay. They are in no position, therefore, to resist and overrule those exercising unlawful power. It is uncustomary to publish minority (dissenting) judicial opinions with majority opinions for fear that it will reveal a disunited and weak state.

Because the law binds the government in common-law countries, the state is limited (not *total*), allowing the individual leeway to assert his God-given rights against unlawful government power. Common-law government is of limited jurisdiction or authority. The common law disperses the authority to act concerning any particular matter. In addition, common-law limits the power of the state to regulate and curtail personal freedom at will.[1780]

[1780] Our Constitution distinguishes between *jurisdiction* and *power* in that it authorizes Congress to prescribe the subject-matter jurisdiction (the right to hear certain matters but not others) of federal courts other than the Supreme Court, i.e., "inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9 (lower case in original); *See also id.* art. III, § 1, cl. 1. The Constitution, however, forbids Congress from limiting the judicial *power* of those inferior courts respecting matters over which Congress has given them jurisdiction. Within the jurisdiction Congress chooses to prescribe for the lower federal courts, the Constitution, not Congress, gives full judicial power: "The judicial *Power*," declares the Constitution, "shall extend to all Cases in Law and Equity arising under this Constitution . . . ." *Id.* art. III, § 2 , cl. 1 (capitals in original, emphasis added). Thus, the Constitution never grants to Congress or to the President authority to define or alter the judicial power of the common law inherent within any given subject matter. It does, however, grant to Congress the right to

For example, the civil-law state denies the right of the Writ of habeas corpus, but even if it granted the writ, it will be ineffective because civil-law judges are neither detached nor neutral and independent from the state, having arisen from the state's dependent civil service, instead of the from the ranks of independent practicing lawyers. Moreover, upon appointment, civil-law judges remain members of the state's civil-service corps and, therefore, without independence to buck their superiors.[1781]

Even though the courts in common-law countries neither command the raw power of the executive branch, nor woo the popular vote with the aggression of the legislative branch, the common law renders to its courts and judges dignity equal to the executive and legislative branches. Equal dignity of the common-law courts arises from its recognition of two principles: the court's power to apply law is independent from legislation and the responsibility of applying the law rests on each individual. Even with this equal dignity, however, common-law countries acknowledge that the courts are also fallible and, therefore, demand that courts publish minority judicial opinions with majority opinions.

In the common-law tradition, the government and its agents are immune from being dragged into court, unless they act outside the scope of authority the law has given. For example, judges are immune from liability for all judicial acts—actions taken within the scope of judicial powers—, regardless of how aberrant.

The civil-law tradition never deems the state to be the product of the law, but rather, deems the law the product of the state. It follows, therefore, that the civil law's Code—*Corpus Juris Civilis* and its variations—can only bind the state, chief-of-state, and lesser agents of these with the state's consent, but it does bind every other person. Thus, the civil-law state arrogates a divine kind of power. Even though some civil lawyers reject this notion in principle; the civil law, nevertheless, empowers the state to issue executive decrees suspending legislation that protect individual rights from state infringement.

The civil-law judge is without dignity independent of the legislative power; if the state imprisons a person without cause, the judge is powerless to stop it. Common-law rights such as the Writ of habeas

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limit the subject matter that a lower federal court can hear: *e.g.*, whether cases sounding in patent, admiralty, contract claims against the federal government, or etc.

[1781] Some civil-law countries, such as Sweden, claim to have provided independence for their judges. Sweden's claim, however, is questionable because even in true common-law countries, it remains an ever-present struggle to maintain an independent judiciary. In the United States, for example, men increasingly rise to judgeships from government service instead of from long-standing private practice.

corpus[1782] have no part of his thoughts, much less in the law's arsenal for protection of individual liberty. Even though judges in a civil-law nation are plenty, the state's ever-present ability to reduce judges' pay or dismiss them from their livings, if by their decisions they fail to uphold the will of the state, castrates them of independent mind. A civil-law judge insures his position and his salary by enforcing the state's desires as expressed by the decrees of a legislature or a demagogue.[1783] A civil law judge that publishes a judicial opinion dissenting from the will of the state, risks, at the least, his career and livelihood.

II.

COMMON LAW—Trials are adversarial; thus, the common lawyer is a combatant for his client to whom he owes absolute loyalty. The lawyer is independent of absolute state control. The common law leaves not only the determination of facts in the Jury's hands, but also the verdict of guilt or innocence: that is, the application or non-application of the law. Common law responds foremost to the protection and nurture of private relationships.

CIVIL LAW—Trials are inquisitorial; that is, the judge colludes with attorneys of both parties in an investigation to discover the facts, according to the state's notions of justice. The civilian attorney's first duty is not to his client, but to the tribunal, whose loyalty is to the state or chief-of-state. The attorney, therefore, is in the state's control. Civil-law tribunals, foremost, enforce the state's will as given by its Code.

[1782] See generally § 3.7.12 of this book (discussing the worthy purpose of the Writ of habeas corpus: a weapon against inquisition).

[1783] Adam Smith held that such individual dependency upon the state (such as that of a civil-law judge) tends toward destruction of human personality and the demise of a people. In making this point, Smith contrasted the voluminous pile of statute books of municipal law in force in Paris in his day (*circa* 1775) with the few laws that applied to the residents of London. He then demonstrated that crime in Paris (at that time) was epidemic, while crime in London was negligible, concluding that dependency caused excessive crime in Paris. He further concluded that no amount of legislation can overcome the evils of dependency.

Smith's observations are timeless and unconfined to any economic class. Witness the present lawlessness resulting from the dependency of body, soul, and mind fostered by American welfare—whether called public aid or dignified with the terms *civil service* and *subsidies*—and the use of state power to achieve legislative plunder by different groups, one of another. Lawless behavior on the bench of a court ensues, where the judge is dependent for his position and pay upon whether his decisions support state policy and directives in derogation of first principles. Dependent judges, being kept-men, are *yes men* and like Balaam, have become prophets for profit.

Common-law trials are adversarial, open to the public, oral, and carried out in an atmosphere of daylight;[1784] opposing lawyers each develop their case and engage in vigorous cross-examination. During this process, the common-law tradition requires that the judge function as an umpire, remaining neutral and ruling between the opposing parties only in their disputes over the rules of the contest: the laws of evidence and of proper procedure.

The judge, in order to make intelligent rulings where litigants disagree over the rules, must follow close the movement of the contest. Because the common-law tradition is adversarial, common-law courts stresses attention to proper procedure and fair play. The common law places all confidence in parties in sharp conflict to insist upon right procedure (due process) to yield the right outcome; the civil law places all confidence in the command of the scholar-legislator.

Activist judges, quick to take sides, pose a threat to the liberties the common law affords. The worth of our adversarial tradition depends upon each opposing lawyer vigorously engaging in protecting the rights of his client, thereby sharpening the conflict enough to lay bare the truth. The sharper the conflict, the sharper the parties; the sharper the parties, the sharper the action; the sharper the action, the better likelihood of laying bare the truth. Common lawyers are duty bound to protect their clients from lawlessness; the common law provides the means. Further, the Supreme Court holds that the Jury is a buffer between the accused and a lone employee of the state: the judge.[1785]

The civil-law tradition, on the other hand, is inquisitional. Civil law conducts much of its proceedings in writing and behind closed doors. It

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[1784] Americans, upon entering courtrooms that close out sunlight because windowless, ought to be rankled. Courtrooms without sunlight give the feeling of being in a vault of moral darkness, dank and foreboding. One reasonably concludes that the *powers-that-be* and their architects intended such gloom.

In the notorious 1912 New York *Becker* case, Judge Goff demanded, "Have the shades drawn low. There is not enough gloom in the courtroom." STRYKER, *supra* note 48, at 66. See also generally *id.* at 32, 65–70, 72–73, for an account of Stryker's personal observations of this trial. A design to exclude sunlight from courtrooms betrays a nefarious inclination. Heating efficiency need never prevent installment of courtroom window lights; today's technology even produces windows that stop loss of heat. Men love darkness because their deeds are evil. *See John* 3:19. Darkness comforts evil men and allows an atmosphere of fear, mystery, and confusion; light discomforts evil men and is conducive to truth.

The common-law tradition demands public trials, which, therefore, must be oral; the civil law, on the other hand, conducts its inquisitions in secret and mostly in writing. The present practice in the federal courts of allowing prosecutors to file sealed pleadings in criminal prosecutions gives the perception of unlawful conspiracy and collusion, amounting to the denial of the accussed's right to a public trial.

[1785] *See* Blakely v. Washington, 542 U.S. 296 (S.Ct. 2004).

is inaccurate to speak of *civil-law trials* because the civil law never tries cases, but instead, conducts inquisitions: only the judge asks questions of witnesses or the accused. Attorneys suggest the questions they desire the judge to ask of a witness, but even if the judge chooses to ask a suggested question, he will ask it in the way that suits him. Civil-law attorneys (called *civilians*) have no real means of protecting their clients from the judge: the state's employee.

III.

COMMON LAW—The courts' Jury verdicts and written opinions are *evidences* of the law's discovery. Jury verdicts and court opinions reveal law's specific application to past events that have arisen from particular relationships. Common law speaks in retrospect: it determines, by adversarial trial, and judges what has happened, according to the experience of previous judgments on like facts. In seeking guidance for the future, the common lawyer seeks the consistency of the law by gathering the records of past cases on like facts and asks: what is the ever-present principle, threading through the written opinions?

CIVIL LAW—The state's legislation respecting an unknown future *is* the law the courts must apply. Civil law speaks in prospect: by its legislative Code, it judges what it believes will happen, then forces the facts of any given dispute into a provision of that Code. In seeking legal guidance, the civilian lawyer and judge consults the language of the Code to know the will of the state.

In the common-law tradition, lawyers and courts seek to discover the principle of law and its application for any particular circumstance, never assuming legislation addresses aright the facts of the case at hand. Because common-law standards arise from the kind of relationship between disputing parties, in beginning its pondering of a case, a common-law court must determine the kind of relationship between the disputing parties.

In a common-law country, the controlling standards of law (rules of law) develop in consistency as non-statutory law from custom and *stare decisis*: to stand by things decided.[1786]

[1786] *Stare decisis* requires a court to rule consonant with previous appellate cases above it in its hierarchy that are akin to the case then before it. *Stare decisis* is the established and indispensable—at the same time unwritten but binding—custom of the common-law. Without *stare decisis*, the common-law tradition will cease. Moreover, *stare decisis* depends on analogy: facts and circumstances that resemble, but are not precisely the same

Appellate opinions with facts akin to the case under consideration are binding under *stare decisis*. Even fields of law where statutes heavily regulate—such as the Uniform Commercial Code—are overlain with a body of controlling judicial opinions that interpret and apply its provisions. Even if the case before the court involves a dispute over the meaning of a statute, the court's opinion may never cite to the statute's language. For example, in considering Statute of Frauds cases, common-law courts often cite many court opinions, but seldom mention the language of the Statute of Frauds.

By contrast, civil-law systems deem statutory law to be the whole body of law, complete and sufficient unto the case at hand; therefore, judges, in their written decisions cite only the Code's section number. In every case, the civil-law judge must repair to the language of the Code and disregard all prior court decisions. The influence of custom creeps in only when the civilian judge cannot force fit the facts of the case before him into a provision the Code.[1787] In no event, however, are any previous opinions binding. Consequently, civil-law tribunals never develop consistent applications of the Code on like facts. Civil-law judges are cogs in the state's legislative machinery; disputing parties' only option of resolution is to process their legal differences through the cogs of the

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as that to which it resembles. Analogies are *resemblances* and never exact duplicates. An analogy occurs when one thing resembles another; if two things are exactly alike, no analogy exists. Thus, all analogies must eventually break down because at some point, analogs (things alike at points) are also different at others. Analogies, therefore, require seeing of facts alike, while acknowledging differences.

Lord Halesbury neatly compressed the concept of *stare decisis*, stating that a case opinion is full authority only for what it actually decides. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 100–01 (1991). For any future case, however, a case opinion serves as binding guidance. Common law's application of authority expands slowly: one case at a time.

[1787] If the Code has no provision suited to the peculiar facts before the tribunal, the civil-law court will fabricate an application of the Code by creating a fiction to foist upon the facts and circumstances. For example, if situation A (the facts and circumstances before the court) fits no provision of the Code, but situation B (a hypothetical) does fit into a provision of the Code, then the court will treat situation A as though it were situation B and apply that provision to it.

By contrast, the common law says that where there is a wrong there is a remedy, but if there is no remedy available from the precedents, the court will make findings of principle and fashion a remedy that gives real relief, i.e., justice. Common-law courts, being independent from the legislative and executive branches, do not depend upon legislative and regulatory decrees to bring substantial justice to the parties before the court, regardless of the circumstances. As one traces the principles of the common law through court opinions, one observes two truths: the principles of the law—though deviated from at times—remain immutable; meaningful application of these principles in each new instance requires the individual exercise of discernment. *See Hebrews* 5:12–14, *drawing from Isaiah* 28:9.

state's imperial tribunal, which operates to insure conformity with the state's will.

Civil law is *positive law* in that it claims to base its authority on state power: acting just as often because it can and not because it ought. The civil-law culture respects state power as long as the state shows the will to use its power. The common-law ideal, on the other hand, respects power only where exercised by lawful right. The polestar guiding the common lawyer's understanding of statutes is application of court-developed rules of law using *stare decisis*. By contrast, the civil lawyer's only authority source remains the language of the Code.

Chapter Six

Conclusion

§ 6.1 *Summing Up*
§ 6.2 *False Safety*
§ 6.3 *Present Danger: Administrative Law & Fear*
§ 6.3.1 *Executive Orders*
§ 6.3.2 *Government Lawyers as Judges*
§ 6.4 *A Specific Call*
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§ 6.1
Summing Up

The whole structure of our present jurisprudence stands upon the original foundations of the common law . . . [I]t has become the guardian of our political and civil rights; it has protected our infant liberties; it has watched over our mature growth; it has expanded with our wants; it has nurtured that spirit of independence, which checked the first approaches of arbitrary power; it has enabled us to triumph in the midst of difficulties and dangers threatening our political existence; and by the goodness of God, we are now enjoying, under its bold and many principles, the blessings of a free, independent, and united government.[1788]

JUSTICE Story penned the foregoing words to refute subversive forces then afoot in many American States, working to supplant the common-law tradition with the civil-law Code. Nowadays, as a general ignorance of the common law's excellence advances, fear grows and faith in government takes hold. Civil law allows differing factions to use state power against each other. Many on the political left, wanting to satisfy envy by abolishing common-law protections of private-property rights by

[1788] STORY, *supra* note 89, at 65–66.

the forced redistribution of wealth—using inflation and progressive income taxation—but never realizing that by so doing they abolish their own property rights. The common law also suffers attack from the political right, many wanting to get at those of whose conscience and behavior they disapprove by suspending common-law procedures, protections, and liberties, but never realizing that by so doing they also suspend their own liberties of thought and act. Thus, many of the political left, blinded by self-righteous envy, refuse to accept economic reality; while many of the political right, blinded by self-righteous bootstrapping, have yet to feel the force of—and therefore remain ignorant of—government trespass upon fundamental rights. The lesson of history and of Scripture, however, rings clear: to have authority and *the ability to respond* (responsibility) to the government's taking of another's property or to the infringement upon another's fundamental freedoms, but refusing to respond, is to partake in lawlessness.[1789]

The Supreme Court, in response to President Truman's attempted seizure of steel production mills during the Korean War, affirmed the Framers' conviction concerning the worth of history, their understanding of basic human nature, and their determination to limit government by holding the powers of government separate and thus in balanced tension:

> The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light . . . on the need for limitations on the power of governors over the governed. To that end, they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not merely theory; it was a felt necessity. Not so long ago [referring to the days of Franklin Roosevelt's New Deal] *it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule the system as outmoded—too easy*. The experience through which the

[1789] *See generally Obadiah* 11–14 (stating that failure to act in resistance to lawlessness imposes criminal liability, where one's relationship to the victim imposes a legal duty). In *Obadiah*, Edom's failure to act in Jacob's defense amounted to "violence against your [Edom's] brother." *Obadiah* 10. The relationship demanded a duty. In such cases, he who is silent is understood to consent.

> world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological, psychological, or sociological immunities from the hazards of concentrated power.[1790]

Affirming the common law's limitation of executive power—the same doctrine limiting the power of the Anglo-Saxon kings—, the Supreme Court rested its convictions, as did the Framers before them, upon the weaknesses of man as revealed in light of history's lessons. To experience freedom, men must conduct government in the light of history's lessons, the common law's guide marker. Thus, the Court affirmed the Framers' conclusions with the benefit of light added by recent history of the preceding twenty years.

This book began by observing that God is sovereign over history and continued by recounting history relevant to an understanding of the common-law tradition. Following is a summary of conclusions based upon history's facts.

Our Anglo-American common-law tradition—though also practiced by other Teutonic tribes including the Scandinavians and the Britons—traces first to the Anglo-Saxons' and Danes' Germanic folk law, consisting in principles practiced by custom observed from time immemorial. The unique features of the Anglo-Dane's common law—*e.g.*, trial by a twelve-man jury, stressing of facts and due process as opposed to result, law according to relationship and not state will, separation of powers, case precedent, and multiple opportunity for appeal—are found in Scripture and first century Israel, indicating a strong nexus between the two peoples. However, the trace of history's record, harking back from the English common-law to the Hebrew Scriptures and first-century Israel, is, at points, less than clear.

Any clearness of this trace, though helpful, is hardly as important as the clearness of English common law's harmony with Scripture. The authority of common-law principles depends not upon any unbroken chain of delegation among men, but upon God's direct delegation from His written Word to the individual. Indeed, according to Scripture, the

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[1790] Youngstown Sheet & Tube Co, v. Sawyer, 72 S. Ct. 863, at 888–89 (1952) (emphasis added). The Court's choice of terms is precise. The Framers form the Constitution in the context of their new circumstances in the New World using the common-law tradition of government as the building material.

common-law ideals arise by nature in the minds of all men, God having stamped upon man's nature the ability to recognize these ideals. Thus, throughout history, groups have formed like-incipient ideals of common-law limited government. Where the Scriptures were not the sustaining power for these ideals, men depended upon their minds to uphold common-law government, which gave way to expedience and convenience of the powerful.

Upon arriving in Britain, however, the Anglo-Saxons saw their *Volkriht's* (folk law) accord with Scripture. God's Word became the folk law's steady foundation; the Isle of Britain became its greenhouse, allowing it to reach maturity, and then to withstand the encroachments of civil law from the continent.

The implanting of the Christian Scriptures into the Anglo-Saxon tribes replaced *wyrd* or fate—the foundation of their understanding of life and reality—with the Words of Jesus Christ. The Anglo-Saxons' view of this present world (Anglo-Saxon, *wer-ald*: meaning "man's age") was comparable to the Scripture's description of this present age as "the age of man's judgment." The Scriptures, however, added encouragement, promising the coming Day of the LORD, when all things will be righted.

God's Word enlivened and steadied the Anglo-Saxon's tradition of folk law by infusing it with the unifying Christian ideals. These ideals transferred the unchecked and unbounded vengeance of their blood feud from themselves to God, to whom alone vengeance belongs;[1791] confirmed the letter of the law with the Spirit of the law, diminishing neither; replaced trial by battle with battle by trial and the hurling of weapons with sworn testimony. Most key, the Scriptures drove out the folk law's hopeless fate, replacing its shifting foundation with grounded principles of steady purpose and meaning for life and the frame of government resting on it, while leaving that frame unaltered.

Scripture divides God's creation into two realms: heaven and earth.[1792] For example, in His Sermon on the Mount, Christ instructs the disciples to pray, "Your kingdom come, your will be done *on earth* as it is *in heaven* . . . ."[1793] The Christian world-and-life view, therefore, never demeans the sanctity of that which pertains to this earth in distinction to that which is heavenly. Instead, it affirms the sanctity and importance of

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[1791] *See, e.g., Hebrews* 10:30, *Romans* 12:19, *Psalm* 94:1, *Micah* 5:15, *Deuteronomy* 32:35. In Scripture, divine vengeance and divine justice are inseparable.

[1792] Scripture, references these two divisions (the heavens and the earth) of creation at its opening in *Genesis* 1 and at its closing in *Revelation* 21.

[1793] *Matthew* 6:10.

both, teaching that men swear neither by heaven, for it is the abode of God, nor by the earth or land, for it is the sacred footstool upon which God rests His foot. Moreover, who will deny that the Creator is concerned for His earth and its land? Scripture's account of history shows that God is willing and able to arrest defilement of His earth—case by case and locality by locality—, causing it to vomit out its defiling inhabitants.[1794]

Dividing reality into two realms, heaven and earth, Scripture recognizes that God's eternal declarations from heaven establishes a higher standard than man's time-bound expressions declared on earth. This scriptural view of the world challenged the Anglo-Saxons to express the Creator's timeless values in their temporal world. Christianity strengthened and improved the folk law, but without depreciating its worth. The Anglo-Saxons took the Scriptures as the standard against which men are to measure all human expressions of law[1795] and demanded high respect for human expressions of law that were consonant with Scripture. In short, the scriptural view of the world and life provided the superior standard whereby to weigh the Anglo-Saxon's folk law.

Ignoring history[1796] brings ignorance of history, resulting in untold suffering. The remedy is to get right knowledge concerning law and government. Such knowledge is gotten by doing five things: *first*, discern and exercise true law (i.e., consonant with the character of the God of Scripture); *second*, teach that true law, rejecting all else; *third*, insist upon independent courts: each juror, each judge, and each lawyer acting

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[1794] *See, e.g., Leviticus* 18:25.

[1795] The LORD eloquently expresses eternal law in the Sermon on the Mount. *See Matthew* 5:1–7.

[1796] *See, e.g., Judges* 2:10: "[T]here arose another generation after them, which neither knew the LORD, *nor even* [גם: *gam*] the works He had done for Israel." (emphasis added). The second clause, introduced by "nor even" is intensive as are all clauses introduced by the Hebrew particle *gam*. *See* GESENIUS' HEBREW GRAMMAR, *supra* note 152, at 483. This passage, coupled with the remainder of *Judges*, reveals that to be without the intimate knowledge got by trusting and obeying the LORD, the covenant God of Scripture, is detrimental; but to be ignorant of the history of His works in fulfillment of His covenants is downright dangerous. *See also Exodus* 1:8.

In spite of man's ignorance of his Creator's covenants and his behavior contrary to them, "[a]ll things work together for good . . . " (*Romans* 8:28) *vis à vis* God's people, but not all events are intrinsically good. Indeed, the behavior of mankind has been only evil continually. Consequently, God's wrath is "constantly being revealed from heaven against all ungodliness . . . ." *Romans* 1:18. Paul the apostle uses the present active indicative of the verb *αποκαλυπτεται* (*apokaluptetai*) to stress that God's wrath is a constant, observable activity, "currently and continuously being revealed . . . ." *Id.* History is not always pleasant reading, but is, indispensable reading. History is for our learning; ignorance of it leads to hopelessness. *See, e.g., Romans* 15:4.

and speaking from independent judgment so that our courts will engage in the free and frank discovery of law's befitting application without undue influence from the executive or legislative powers; *fourth*, stay loyal to the fixed rule of law as set down in first principles and precedent, as opposed to any arbitrary rule of men (rules unfounded on first principles); and *fifth*, never allow the will of the majority to overrule fundamental rights and responsibilities inherent in lawful relationships.

§ 6.2
False Safety

Yet, after all, the fabric [of our government] may fall;
for the work of man is perishable, and must forever have inherent elements of decay. Nay; it must perish, if there be not that vital spirit in the people, which alone can nourish, sustain, and direct all its movements.[1797]

Nowadays, government in these United States operates in open and high-handed violation of common-law limits set down in the Constitution, both explicit and implicit.[1798] Americans, nevertheless, still have a vague impression that the United States is a constitutional democracy or republic.[1799] Likewise, long after emperor worship had engulfed the Roman Empire, the general and undefined perception persisted—by

[1797] STORY, *supra* note 89, at 326. "[T]hat vital spirit" of which Justice Story speaks, though necessary to sustain right government, is derivative: it resides only in the one having received it from his Creator.

[1798] At first, James Madison denied that a bill of rights was a necessary addition to the Constitution because the Constitution's enumeration of powers in Article I set right limits for the federal government. Madison further believed because the powers of government were separate and coequal, they will remain adversarial, keeping the federal government within those bounds, but he was mistaken. With foresight, however, Madison conceded and changed his position, agreeing that a bill of rights will do no harm but only good; therefore, he supported its passage. In recent decades, the federal government's unrelenting transgression of the Constitution's Article I barriers limiting its powers has forced those aggrieved by such transgressions to make their final stand for limited government on the Bill of Rights, case by case. As government and the courts transgress and then erode this paper barrier, scant protection is left.

Liberty, nevertheless, exists not on paper, but in the mind and action; it is one's conviction about God as Creator that moves one to act. The first step in gaining liberty is individual acknowledgment of God as Creator, of the individual's relationship to Him as creature, and that God is the Author of his rights and liberties. No other way exists and no short cuts are available. *See Hebrews* 11:6.

[1799] The popular mania that the United States is a kind of *democracy* or species of *democratic-republic* leaves these terms beyond hope of any clear definition. Thus, these two terms remain tools of political manipulation for exploitation of people. See generally § 5.3.5 of this book (discussing the utter failure of consensus concerning the meaning of *democracy* or understanding of its practical implications).

political design of those in power—that *the people* still controlled the empire. Because the idea comforted them, the Roman people kept this false perception alive by repeating it to one another. Their mantra fed a feeling of security, while lulling them deeper into bondage of totalitarianism.[1800]

Likewise, first-century Israel nurtured a willful blindness akin to that of the Roman people. Before the first century, Israel's fathers had been under bondage to the Babylonian system in Ur of the Chaldees, in Egypt,[1801] in Babylon itself, and during the first century, to the emperor of Rome. Moreover, throughout her history, the people of Israel struggled under bondage to sin. Yet, when Jesus Christ offered the truth and the promise of deliverance from sin, giving personal freedom, many of them responded with politically correct speech, "[N]ever at any time have we ever been enslaved to even one man."[1802] Prideful talk, however, goes before one's fall. In A.D. 70, the Roman general Titus surrounded Jerusalem; using siege warfare, he leveled the city and slaughtered its inhabitants.

Civil law continues to threaten our traditions of freedom. National and state governments ever-more exceed common-law and constitutional bounds. Bureaucrates, administrative-law tribunals, and regulations usurp the lawful power of the Jury, courts, and legislatures. Presidents

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[1800] As long as one entertains false perceptions of *peace and safety*, one's guard remains down and falsehood will have its opportunity. 1 *Thessalonians* 5:3: "Whenever they shall say, 'peace and safety,' at that moment, of a sudden, ruin shall overwhelm them . . . and they shall certainly not escape." Paul writes in forthright figures. The safety Paul speaks of here (*ασφαλιεα: asfaliea*) is financial and economic security. Papyri from Paul's day demonstrate that *asfaliea* is a legal term for all sorts of bonds and securities. In addition, according to A.T. Robertson, Paul's use of *ποτε* (*pote*: at *that* exact moment) denotes a cumulative force coming against the speakers, while they are speaking. Paul creates a picture of coming destruction that will without warning swell over those deluded persons at the precise moment their mouths are open and repeating the feel-good mantra: "peace and safety." *See* ARCHIBALD T. ROBERTSON, GRAMMAR OF THE GREEK NEW TESTAMENT IN THE LIGHT OF HISTORIC RESEARCH 1147 (1923).

Moral decay results from delusions, such as those cited in 1 *Thessalonians* 5:3. If an enemy does defeat America by a blow from without, it will be only because she has brooked moral decay within. History teaches that as long as Americans persist in telling one another that they live in unthreatened freedom, false perceptions will multiply, conforming American law and government to the false notions of these fleeting times, further leading her into bondage.

[1801] During Israel's approximately 400 years of slavery in Egypt, she worshipped the false gods of the Egyptians. *See Joshua* 24:14; *Jeremiah* 44:8, *Ezekiel* 20:5–10. Israel's deliverance from this bondage was an act of God's undeserved acceptance, not a reward for good behavior. So also today, God delivers the individual while yet in his sins. If a person is able to extricate himself from his slavery to sin, deliverance by God is unnecessary.

[1802] *John* 8:33b.

wage war, tap wires, maintain personal databases on individuals without probable cause or even reasonable suspicion, and strain to justify torture. Prosecutors—with impunity, in callous violation of their oath—seek to push over and punch through common-law and constitutional protections and do so. Judges and lawyers consider the presumption of innocence a legal fiction; others have forgotten it all together or have never considered it. In short, an *us*-verses-*them* attitude spreads among government employees at all levels—judges, police, clerks, agents, and assorted, nameless bureaucrats—against their countrymen.

§ 6.3
Present Danger:
Administrative Law & Fear

> *There was a steady growth of administrative agencies in the states in the last decade of the nineteenth century and the first decade of the . . . [twentieth] century, as part of the rise of social legislation. At first, this produced a certain friction with the courts . . . This led some advocates of administrative development to denounce the separation of powers which is fundamental in American constitutional law . . . .*[1803]

So-called administrative law is the civil-law weed gone to seed. Its snarl brings bewilderment and fear. Administrative law tangles a person's mind, time, and resources in hopeless regulatory minutia, forcing him to deal with the state's self-proclaimed experts and keeping him and his grievances in the power of administrative bureaucracies, away from the common-law courts. Once people lose confidence of direct access to common-law courts to right wrongs, the state's bureaucracies step in, claiming they will keep wrongs from even happening and stirring fear of what *might* happen unless the bureaucrats are given more power and control. Then, once they have gained such control, they threaten criminal prosecution to the one refusing to bow to state power—even when that power is lawless.

In its modern form, administrative law arose out of the papal revival of civil law during the tenth century and over the next few centuries spread into civil-law states. The French revolution's elite carried

[1803] ROSCOE POUND, ADMINISTRATIVE AGENCIES AND THE LAW (n.p.) (1946). The characteristics of administrative law, says Pound, are excessive zeal, absence of a fair hearing, disregard of evidence, prejudgment by administrative agencies, improper delegation of authority, and obstruction of judicial relief.

administrative-law ideas into supposed sophistication; this elitism has now seeped into America.[1804]

Advocates of administrative law, by downplaying common-law separation of powers, have captured the minds of lawyers and judges; thus, the foundation of American constitutional law is weakened. "Administrative law," says Justice Felix Frankfurter, "deals with the field of legal control exercised by law administering agencies other than the courts . . . ."[1805] It is regulatory law promulgated by the executive power in the form of not only regulations, but also executive orders, and interpreted by the executive branch's administrative tribunals; further, the executive power enforces its interpretations.

By this arrangement, the enactment, interpretation, and enforcement of laws are all under the executive's control. Administrative law, by gathering all powers of government—legislative, judicial, and executive—into the single will of the executive, subjects its administrative judges into dependency on their political boss, the executive. In a word, such power gathered into a single hand transmutes government into the all-powerful *state*, claiming right and ability to meet all needs. Where the state, however, is powerful enough to meet all of one's needs, it is also powerful enough to take all of one's rights and property.[1806]

Though bureaucracies promulgating administrative regulations claim to hold themselves within the bounds of executive legislation, in practice they exceed those bounds and even write more regulations to justify their trespasses. Administrative law is dangerous: its characteristics, says Roscoe Pound, are excessive zeal, absence of fair hearings, disregard of evidence, prejudgments by administrative bureaucracies, improper delegations of authority, and obstructions of judicial relief.[1807]

[1804] *See generally* BERMAN, *supra* note 9, at 94 and ff. (showing that Hildebrand, as pope Gregory VII, expanded the use of administrative bureaucracy through the propagation of Roman civil law).

[1805] 75 U. PA. L. REV. 614–15 (1927).

[1806] "A government big enough to give you everything you want, is a government big enough to take from you everything you have." Gerald Ford, Presidential address to a joint session of Congress (12 August 1974). This quote is often wrongly attributed to Thomas Jefferson.

[1807] Having once been asked to assist in adjusting a state administrative code to govern oil and gas producers, the writer got an inside glimpse of the administrative process and a taste of the bureaucratic attitude behind it. The head of the oil and gas department had drafted the entire code; indeed, the department had hired him for that very purpose. Though never told the writer, the adjusting sought was intended, by slight of words and phrases, to discourage and bar oil and gas producers from access to the regular courts by sowing a tangle of administrative brambles. The regulatory code, by confining the determination of facts to the department's administrative tribunals, eliminated use of the Jury to determine the facts of the case, leaving only the application of the law for any appeal

For over seventy years, American courts have evermore justified compounded powers, arguing the need for administrative expedience. To deny the executive branch judicial power, say some, will clog the courts of the judicial branch. Americans can avoid clogged courts, however, without transferring judicial power to the executive: instead of hiring swarms of dependent administrative judges—beholden to the state for their job security—to handle the judicial burden, America must appoint and more independent judges to the judicial branch, allowing aggrieved parties to enjoy ready access to a more-likely neutral court and the Jury.

In addition, increasing the number of judges in the judicial branch will bring seven benefits: it will offer courts independent of the executive and legislative powers, it will remove need for the politically-biased personnel of the administrative courts, it will encourage respect for the law—which tribunals under executive control have eroded and demeaned—, it will better preserve due-process rights and fundamental freedoms,[1808] it will make justice readily available to every individual, it will end the discouraging quagmire of administrative law, and it will provide speedy official closure to disputes. Consequently, the public's confidence in the courts to deliver justice will improve.

Americans have put unnecessary excessive power in the hands of the executive branch at the cost of fundamental freedoms and common-law rights. At bottom, administrative law prevents due process[1809] by capricious regulations and administrative tribunals, keeping the individual from access to independent judges.

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to the state courts. Moreover, once the state legislature approved the administrator's code, it enjoyed the strong presumption of constitutionality.

Thus, for an aggrieved party to get a jury trial on the facts, he had to go to administrative hearing, where the department established the facts to their liking; appeal to state court on the issue of application of law; then appeal on the right to trial by jury, which can take months or even years, and much money and likely still leave him without a Jury trial. Moreover, at administrative hearings, the administrative judge and prosecutor predetermined the bureaucratic will: to wit, all small oil producers must be put out of business to make way for large corporate producers. In the cases the writer observed and had participated as defense lawyer for small producers, the administrative judge was a young attorney fresh out of law school, claiming an expertise in administrative and environmental law. The administrator, once having drafted the regulatory code for that state, another state recruited him to draft one for them. "Oil and gas law," he told the writer, is not about production and relationships, but "is environmental policy."

[1808] The appointments of judges to administrative courts are partisan appointments; thus, administrative judges are prone to calculate their decisions to preserve the executive's will, position, and reelection.

[1809] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

The legislature and courts, therefore, must limit the executive's power to hire more bureaucrats, to promulgate more regulations, and to multiply his own administrative judges to decide how to apply his regulations. The legislature and courts must curtail the executive branch bureacrates. In short, Americans must allow only their legislatures to legislate, never their governors and presidents. Some argue that the Supreme Court ruled in favor of administrative power a long time ago, putting the question to rest. Nevertheless, law obligates the Supreme Court to overturn, as it has done in the past, its mistaken opinions.[1810]

By establishing additional courts in the judicial branch, America will experience that which William Blackstone cites as the peculiar strength of the early Anglo-Saxons justice: courts of jurors as judges empanelled at every level and locality—from the village neighborhoods of the manor courts and the countrysides of the hundred courts, to the shyre motes, or county courts, and the Crown's courts. By these, says William Blackstone, justice came to the door of every cottage. So also today, Americans must empanel the Jury in their church assemblies, townships, villages, cities, water districts, and irrigation districts. Corporate charters of jural entities must empower the empanelling of the Jury, according to the course of the common law.

Karl N. Llewellyn was a leader of the legal realist movement during the first one-half of the twentieth century and a critic of administrative law. Following his survey of about twenty leading legal realists, he found the following agreement among them. *First*, administrative law is a recent development in our common-law country. *Second*, administrative law is a detour from the trail through which parties must struggle in their quest for justice. *Third*, this detour from justice's trail "leads into the wilds of government, and politics, and queer events in both."[1811]

Common law is an accusatorial and adversarial tradition. Thus, it demands a real contest over a genuine issue in dispute between the accuser and the accused with the judge as umpire, insuring the contestants follow rules of engagement. The common-law tradition demands public trials; thus, trials must be oral, allowing the public to hear, scrutinize, and if need be, criticize.

Social anthropologists, following evolutionary dogma, consider the common-law to be the first and lowest attempt at justice among primitive

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[1810] "[T]he law, and the opinion of the judge are not always . . . the same thing; since . . . the judge may mistake the law . . . 'the decisions of the courts . . . are the evidence of what is the common law.'" 1 BLACKSTONE, *supra* note 12, at 71.

[1811] 4 HARV. L. REV. 1222 (1931). Llewellyn calls his discoveries *realism about realism*.

man because the common-law tradition requires opposing parties to produce live testimony and present tangible evidence in the ears and under the eyes of the Jury and judge. The evolutionary anthropologist continues, pointing out that the civil-law inquisitorial system is superior because it does away with the private sector accuser (the plaintiff) against the criminally accused and substitutes the professional state prosecutor. Further, says the anthropologist, the civil-law judge is better than the passive, impartial common-law judge because he is a proactive searcher for the truth, called an inquisitor.

Administrative tribunals operate in the inquisitorial tradition of civil-law criminal procedure, while claiming to follow the common-law standards of evidence and due process. Administrative tribunals, however, are not part of the judicial branch; the common-law standards of evidence and due process do not bind them. Consequently, there is no real contest between two parties before the tribunal; instead, the accused is obliged to prove his innocence to two state employees: the judge and the prosecutor. Further, administrative law substitutes the state accuser for the private plaintiff, thereby causing an imbalance of power against the accused. Its nonpublic procedure multiplies the imbalance.

The recent discovery of Note Books containing the records of jury trials at England's King's Bench[1812] reveal that as late as 1761–1786 behavior now prosecuted by the state as crimes, was then brought before the court in private actions by private parties (plaintiffs), seeking relief in money damages. One rightly assumes that the same affairs obtained before the American colonial courts during these years:

> One of the most surprising facts discovered by reading the Note Books is the frequency of assault as a civil action for damages. One explanation may be that actions which today would be dealt with as crimes were in the 18th century disposed of by way of a civil action for damages.[1813]

Today, however, as the state expands its administrative powers, the taxpayer not only bears the burden of investigation, prosecution, and even sometimes incarceration for otherwise private actions; the victim is

[1812] In the year 1967, 56 Note Books hitherto unknown, were discovered at Scone Palace, giving the titles of all criminal and civil actions tried before the Jury at the King's Bench during the years 1761–1786. The Note Books lists witnesses called and examined, the date of each, and notes of the evidence. *See generally* HEWARD, *supra* note 386, at 49–58 (providing charts and evaluation of frequency of kinds of cases heard).

[1813] *Id.* at 52.

never made whole and each taxpayer is at risk of a criminal prosecution. The cost of substituting an accusing state for the private plaintiff swells an already burgeoning criminal-law industry, spawning psychiatrists, counselors, prosecutors, investigators, so-called public defenders,[1814] officers, prison officials and guards, and government contractors now tapping into public funds and usurping the taxpayer's right to private actions for recovery of wrongs done. Further, the criminal-law industry destroys the ability of the wrongdoer to make the one he has wronged whole: the debilitating effects of attorney-defense fees, government fines, government press releases, loss of livelihood, and even prison terms enrich all but the victim.

Nowadays, bureaucrats and courts will even deem a lawful demand of rights to be a high crime. Petitioning the court for due process against an agency of the government is often styled *obstruction of justice* and given felony status. Even pleading innocence and demanding the right to trial by jury, courts now deem non-cooperation; if found guilty, courts increase punishment for demanding the right to trial. In addition, a defense lawyer that insists for his client that government prosecutors follow due process can become targets for criminal prosecution. Indeed, under regulatory schemes, government can always find something with which to charge a defense lawyer. As a result, fear broods over all, defense attorneys and even judges and jurors.[1815]

But the common-law tradition, instead of fostering a costly criminal-law industry, provides damages to the victim of wrongs without cost to the taxpayer and without swelling the now all-consuming criminal-law

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[1814] The writer once cross-examined a federal public defender, who had chosen to accommodate a federal judge's schedule—to whom he answered for his job and pay—and the prosecutor's wishes, in clear violation of the speedy-trial rights of his client. Soon after the cross-exam began, it became apparent that the witness was drugged. During the course of the cross-examination, he testified that he had been the court's federal public defender for 27 years, but had lost over 90% of his cases. Moreover, against the prosecutor and the judge to whom he answered, he had never allowed a case to go to trial. At that moment in time, he had 40 active defendants as clients before this judge, assigned by this judge, and had received $3000 dollars per defendant upon assignment, further billing the government as the case progressed.

[1815] In the modern bureaucratic state, hardly any are safe from criminal prosecution. For example, "today, every taxpayer is a potential target of a criminal investigation . . . [even those] who diligently attempt to comply with the federal tax laws . . . [I]t is fair to say that every civil examination or audit is a potential criminal investigation, and every criminal investigation is a potential criminal prosecution." But it gets worse, the over reaching of bureaucratic-administrative agencies encourages a person's friends, neighbors, and kin to hunt him for bounty. "People seeking revenge or bounty are another important source of information leading to IRS criminal investigations." P.T. MORGAN, TAX PROCEDURE AND TAX FRAUD 238–40 (2nd. ed. 1999).

industry. Because the common-law has kept the Jury, proceedings are public and, therefore, oral; most trials are still rapid (once begun) concentrated, adversarial, intense, and personal; the common-law demands the right of the accused to face his accuser in open court, before the Jury, all under the scrutiny of the public.

In civil and canon-law tribunals, full-time state-salaried prosecuting attorneys have always been a leading part of criminal procedure. In common-law countries, however, professional prosecutors are a recent addition.[1816] In England, until modern times, the Crown hired a private barrister to represent the public interest in a criminal proceeding. First made popular through comic books and radio drama, then television and movies, career government prosecutors, police forces, and investigators only in modern times have become a part of common-law countries and denote the ongoing shift away from the accusatorial tradition of the common law toward the inquisitorial state power.[1817]

§ 6.3.1
Executive Orders

Executive orders are the President's tool to direct those executing his law-enforcement power. Nowadays, however, presidents use executive orders to legislate their will in the form of presidential decrees; such orders are unconstitutional because they violate common-law principles, particularly the separation-of-powers requirement. Congress has overlooked, brooked, and now approves of this executive encroachment upon its legislative powers, thereby failing its duty. "All legislative Powers herein granted," says the Constitution, "shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[1818] All legislative power belongs to Congress, to be exercised by no other.

[1816] The trend in American rural counties, during the last decade of the twentieth century, has been to change the position of county prosecutor from a part-time job with part-time pay to a full-time position with full-time pay.

[1817] A neutral and objective prosecutor un-driven by personal animus is the common-law and constitutional right of the accused. Government contracted private prosecutors, each retained for single cases, provide objective prosecutions free of direct government vendetta. Government employment of salaried professional prosecutors fosters a bureaucratic, self-preserving, us-versus-them attitude between the state and the private sector.

[1818] U.S. CONST. art. I, § 1.

The Constitution nowhere authorizes executive orders. These are the invention of American presidents, who define them in ways most advantageous to their arbitrary desires. Some presidents have defined executive orders to be a self-binding of their actions, and that of their agents, to the scope of the orders. No President, however, has any legislative authority. Executive orders, therefore, are not law; though an executive order resting upon law already existing, and fully within that law's scope, can be lawful. In any event, courts are without obligation to enforce unlawful use of executive orders.

By 1907, American presidents had issued thousands of orders to the various divisions of the executive branch departments, not to enforce law, but to effect that which seemed best for *the public interest* in the these presidents' eyes. Executive orders thus have become dangerous because they arise not from law but from caprice. "There is no undefined residuum of power," said President William Howard Taft, "which the President can exercise because it seems to him to be in the public interest . . . [His] jurisdiction must be justified or vindicated by the affirmative constitutional or statutory provision, or it does not exist."[1819]

Though already oft used, after Franklin D. Roosevelt swung open wide the gate, the unlawful use of executive orders became a stampede. The Supreme Court upheld the most controversial of F.D.R.'s unprecedented number of 654 executive orders: Executive Order 9066, ordering the imprisonment, without any process of law, of all Americans of Japanese descent.[1820] Later, the Supreme Court criticized its own approval of Franklin Roosevelt's use of executive orders, declaring unconstitutional President Truman's seizure of America's steel mills through executive decree.[1821] Referring to the executive abuses during the economic depression of the 1930's, the Court stated: "The Founders of this nation entrusted the lawmaking powers to the Congress alone in both good times and bad times."[1822]

[1819] WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 138–45 (1916), *quoted and cited in* JAMES L. HIRSEN, GOVERNMENT BY DECREE 7 (1999).

[1820] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[1821] *See* Youngstown Co. v. Sawyer, 383 U.S. 579 (1952).

[1822] *Id.* at 589. Nevertheless, executive orders continue without restraint. Congress has not only ignored the encroachment of executive authority upon its legislative power by presidential use of executive orders, but also has abrogated its responsibility by enacting the War and Emergency Powers Act of 1933. Under color of this Act, President Carter issued Executive Order 12,148, establishing the Federal Emergency Management Agency (FEMA).

§ 6.3.2
Government Lawyers as Judges

An important change is taking place in where judges come from . . . In the Eisenhower Administration, roughly 65 percent came from the practicing bar, with 35 percent from the public sector. Today the numbers are about reversed—roughly 60 percent from the public sector, less than 40 percent from private practice. It changes the nature of the federal Judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar . . . But a Judiciary drawn more and more from only . . . [those in government jobs and seeking better pay] would not be the sort of Judiciary on which we have historically depended to protect the rule of law in this country.[1823]

More and more, judges come to the bench from government careers. Having little to no experience in private law, such judges are increasingly pro state power at the expense of the preservation of private relationships and the rights the individual. In short, the mindset of a government-career attorney, now turned judge, will be biased toward his former client. Indeed, he has habituated his thinking and speech toward his client, naught else is expected. That judges arise from the ranks of government attorneys poses a great threat to our ideals of public liberty and private freedom.

That we are to draw judges from the ranks of lawyers in private practice and not from government lawyers has been an unwritten requirement of the common-law, fundamental and indispensable to the preservation of private rights and public liberties. Private law is the soul of the common-law; the opinions of England's Court of Common Pleas established the common law in strength of character by laying the foundation of the law of private property. Nowadays, those lawyers in common-law countries that make their livings in the practicing Bar before the courts are becoming fewer and farther between.

The raging flames of politics have obscured the steady glow of the unwritten common-law freedom-preserving custom that judges ascend to judgeships from private practice and not government service. Civil-law

[1823] United States Supreme Court Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary* before Congress, *quoted in* THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS, v. 39, no. 1, Jan. 2007. The point of Chief Justice Robert's report is because federal judges' pay is lower than even many local school superintendents, federal judgeships do not draw the best practicing attorneys, but instead, those seeking better pay, many of which are government attorneys.

judges are career government attorneys: trained as government attorneys to enforce the will of the state as expressed by legislation; their oath and duty is to the state. An American common lawyer's oath and duty, however, is to the first principles of the common law, as the Constitution has housed and protected them, insuring his loyalty to the law and his client and not to the state. Being in private practice habituates a lawyer's focused loyalty to the rights of his client alone. By this attitude, the lawyer that ascends to the bench from private practice is accustomed to focusing his consideration upon the *rights* of private relationships. Government attorneys at all levels, on the other hand, grow accustom to directing their ambition to the result that achieves the *will* of their client: the government.

The writer once received an appointment to complete the term of a small rural county prosecutor. During his time there, a Fourth Amendment search and seizure case from that little county, having worked its way through the state courts, finally arrived before the United States Supreme Court for oral argument.[1824] One of the prosecutors in the case attended the oral argument before the Supreme Court. Disappointed in what he heard there, he concluded that the Supreme Court needed more career prosecutors. If one desires former professional prosecutors for judges—those having spent their lives focusing on results (conviction), doing all within their power to overcome the constitutional limits of government—, he is correct. If, however, one desires for judges private practitioners that understand private relationships and the freedom of association, he is incorrect.

Unlike private practice, government service confines attorneys to enforcement of administrative and criminal codes, or to aid in government compliance with these codes. The government attorney is a state employee without an attorney's independent judgment concerning the law's application: he must rather obey his boss, the state, or lose his pay. Common-law relationships are not in the focus, consideration, and understanding of the professional prosecutor and government attorney. Rather, his job demands that he do all within his power to keep all matters within the control of the administrative bureaucracies and push the courts to grant all that they will in the favor of the government's will. Steady erosion of fundamental rights is inevitable.

Never let any one have all power. Never allow all power to be reduced to a single will, whether of one man or any group of men such as a

[1824] Illinois v. McArthur, 531 U.S. 326 (2001).

legislature, bureaucracy, or other institution. In short, never let government gather all power into one hand or branch. The strength of the common law is the multifaceted spreading of power, tolerating, yet antagonistic to the majority principle with the centerpiece being common-law trial by Jury.

§ 6.4
A Specific Call

What boots success in skirmish or in fray,
If rout or ruin, following close the day,
What worth a hundred posts, all maintained with skill,
If these all held, the foe is victor still.

He who would win his cause, with power must frame,
Points of support and look with steady aim—
Attack their weak points, defend your strong with art;
Strike but few blows, but strike them to the heart.
All scattered fires but end in smoke and noise:
The scorn of men, the idle play of boys.[1825]

The quality of proper forms and right substance of law and government will bridle, limit, and oust doctrines and practices of the civil law.[1826] God's people bear the burden of taking the initiative by means of personal discipline, understanding, discernment, and practice, to provide the forms and substance for law and government consonant with Scripture.

Doing so requires individual independence of mind and judgment from all other men and women and total dependence upon God. Evil will never control a country where men and women at every level of participation in, and encounter with, law and government consider well and then decide, each for himself, between right and wrong, and then follow his understanding in good faith and wisdom. Many have warned of the teachings and practices that now threaten our freedoms. By natural sense alone, many see stirring about the resultant confusion and heart ache that comes of refusal to break loose from the undiscerning spirit of this present world.

[1825] GEORGE ROSSMAN, ADVOCACY AND THE KING'S ENGLISH v (1960), *quoting* Justice Joseph Story.

[1826] *See* W.F. Fratcher, "The Government of Geneva Under John Calvin" 24 (1938) (unpublished manuscript, copy on file with author).

Through the centuries, history shows that the common law's ideals of freedom have withstood erosive civil-law notions—the scorn of those impatient with due process and first principles, the ease of expediency, the pleas of necessity, and the assaults of opportunists. The common law has ever been a personal matter concerning real relationships governed by law from the personal Creator. In making all men in His image, God has impressed upon every person—Christian or not—the natural and common ability to discern and institute scriptural ideals for law and government. Thus, all bear the responsibility to do so. Scripture, however, recognizes a further responsibility of the Christian minority:

> [T]heir is a distinctively Christian world-and-life-view . . . The teachings of Scripture in these five areas—man, sin, the world (cosmology), redemption, and the demonic—refine the Christian outlook so that he never need to commit himself to the erroneous social medicines and political panaceas which have from time to time captured the mind of a generation or nation . . . Though the natural man, as Paul calls him, may know nothing of the things of the Spirit of God, he is not totally ignorant of ethical matters involved in good civil government. If this were not true, effective civil government would not exist at all. The biblically informed Christian, on the other hand, knows a good many things about reality in general and about human society in particular which nonbelievers do not know and would not willingly accept if they did know.[1827]

Every individual, Christian and non-Christian, is able to discern right from wrong as to others. Through the Holy Spirit's illumination of written revelation, however, God empowers his redeemed to persistent application of God's law and government to themselves. Consequently, the Christian can know, understand, and practice law and government in a personal way that others can only suppose or acknowledge. The witness of God's Word denies the civil law's utopian fantasies and its ever-attendant revolutionary doctrines. The distant drums of such illusions—whether labeled democratic, socialistic, communistic, or humanistic—

[1827] ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 274 (1974). See generally § 5.1.2 of this book (discussing the unction given only to God's redeemed according to *John* 5:20 that enables the acceptance of truth otherwise offensive to the unredeemed). I have more understanding, said David, "than all my teachers because your testimonies are my meditation . . . because I keep you precepts." *Psalm*: 119:99.

will never capture the desire of the Christian who has informed his conscience aright.[1828] The Christian's understanding brings a further and certain responsibility to resist the spirit of godless revolution by two means: the discipline of personal self government, according to the ideals of Scripture, and the commitment to advance Scripture's ideals in law and government, building these into the lives of others, person by person and case by case.

Because the common law (unlike the civil law) focuses on the protection and nourishment of private relationships, to defend with zeal our common-law tradition is to defend business relationships, religious associations, and family integrity. Relationships freely entered provide the necessary dynamic that yields wealth. Foremost, the common-law tradition guards and nourishes private relationships.[1829] False doctrine constantly threatens to usurp right law and government. Christian freedom produces an undivided loyalty to true law and its lawful application.[1830] Steadfast loyalty to truth's authority banishes the laughing and raging of intellectuals so-called.[1831] Moreover, one will win only by holding fast to the truth and wielding it as the Word of God

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[1828] *See id.*

[1829] Although the natural resources of the United States enable her wealth, without the common law's protection of relationships of family and business, our raw materials—lumber, oil, coal, precious metals, water, crops, livestock, ocean resources, and the creativity work required to add value to these—is for naught. For example, Russia embraces one sixth of the world's landmass, holding more farmland, more lumber resources, more coal, more oil, and more gold than any other country. Yet, because her tradition of law and government concentrates power, the state maintains, by threat of force, a monopoly over all capital and trade, while outlawing private charity. Incentive to produce, therefore, is gone, her abundant natural wealth remains locked away in the land; her people still stand in lines, hoping for enough bread and potatoes to see them through the next winter.

[1830] *See Joshua* 1:7–9: "So that you will do wisely in every place that you walk, the book of this law must persist in your mouth and you must meditate in it day and night, so that you take heed according to all that is written in it because *only then* [אז (*'az*): denoting an emphatic limiting to a condition] shall you cause your way to prosper and *only then* [*'az*] shall you act wisely. *See also* 1 *John* 2:14: "I have written to you, young men, because you are strong: that is, in you dwells the Word of God; in fact [emphatic *και: kaí*], you have overcome the evil one."

[1831] *See Proverbs* 29:9–10. According to Hebraist Walter Kaiser, broad context in *Proverbs* are difficult to discern, but contextual themes within verses and within clusters of proverbs arranged together are discernable. *Proverbs* 29 carries a theme of litigation: "[Where] a wise man is judged [נשפט (*nushapat*): passive] by a foolish man, 'then he rages, then he laughs,' but there is no settlement [נחת (*nakath*): quieting of the matter and laying it to rest]." *Proverbs* 29:9. *Nakath* carries the idea of judicial descent, bearing two meanings into this verse, both intended: (1) to get off the surface by penetrating to the issues of the dispute; (2) to settle (quiet) the matter by laying it down and removing the cause of offence.

directs, never depending on human cleverness and power, brains and brawn.

Practical Christian freedom in law and government demands four things: Scripture's meaning of personal freedom, keen awareness of the common law's accord with Scripture, holding common law's first principles, and lawful opposition toward anything that compromises the common law. Substantive and lasting victory, says Scripture, comes only by competing lawfully, i.e., adhering to right process.[1832] Competition that abandons due process has abandoned fair play and has become lawless. Experience demonstrates, however, that where the common-law ideals of fair play are observed—*e.g.*, equal protection of the rights freedom of religion, of speech, of the press, to chose one's private relationships (freedom of association); limited authority and separation of powers in government; due process; and the common-law rules of evidence—truth, like cream, surfaces and prevails.[1833]

The common law offers no safe harbor from the consequence of wrongdoing by pleading obedience to government. History, nature, and Scripture all justify reliance upon common law's adversarial processes, carried out according to fair play, to bring out the best and the worst in men. In either instance, truth enables the achievement of substantial justice. Abstract musings of scholars, legislators, and magistrates, however, conducted in unhurried ease, have never proven reliable in

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[1832] Even in following one's righteous zeal, however, there is danger. History shows that as God's people take the offensive against false standards of law and government, a temptation arises. In their zeal for right standards and in their need to achieve an immediate perception of victory, they may neglect or even willfully violate those common-law processes and standards that are indispensable to retaining any ground taken. In one's struggle with lawlessness, to succumb to the expediency of the moment is to fall prey to the trap of the enemy: striving lawlessly. *See* 2 *Timothy* 2:5. The word rendered *lawfully* here is the adverb *νομιμως* (*nominos*). God's Word demands that all men observe His standards of behavior in all things, not for their justification, but for man's peace and enjoyment.

[1833] Lawlessness, although seeming necessary for the moment in the heat of battle, abandons good order and, thereby, the effect of one's forces. Success in battle, whether spiritual or physical, demands observance of law for two reasons: obedience to right standards brings confidence that one's relationship with God is in good order (*shalom*), and from this confidence in God arises boldness that then swallows fear and snatches victory out of the jaws of defeat. *Shalom* (ordering one's behavior and relationships according to God's orders), therefore, is the key insuring the moral force of confidence necessary for victory. Though David, son of Jesse, fought many fights, by both individual combat and as a military commander, he never lost a battle. David understood the necessity of *shalom* to winning. His foremost concern, therefore, for the success of Israel's army was the troops' adherence to the order of God's standards: Hebrew, שלום (*shalom*). For example, the army of Israel, then being arrayed against the enemy, "David inquired of the *shalom* of Joab [the general officer], and of the *shalom* of the people [the troops], and of the *shalom* of the war." 2 *Samuel* 11:7.

achieving justice. Without holding to the rules of the contest, no true contest between parties exists; thus, forfeiting our adversarial tradition, concentrating power, and the resulting domination of the few over the many. Therefore, to fulfill Scripture's admonition to compete lawfully, God's participant must take care to observe the rules of the contest and to insist that the court and his opposition do likewise.[1834] The common law provides procedural mechanisms that allow those loyal to the law the opportunity to box-in the lawless, forcing them to observe the rules of fair play.[1835]

Since the founding of Babylon, the foundation of the civil law has been elitist human reason and control. History shows that treacherous devices erupt in those where pure reason is unchecked. The motto *rule or ruin* takes hold; if rule is not achieved, ruin becomes the goal—whether by fair means or foul.[1836]

Humanism dominates legal education, lawyers, and judges.[1837] Undiscerning academic pluralism and vague notions of democracy obscure the distinctive character of the common law. Humanism refuses to relate the particulars of the common law to first principles. Even if jurors, judges, and lawyers hear, they often misunderstand; if they see, they often fail to perceive. Bringing truth to light through oral presentation, the showing of evidence, and filing of pleadings and petitions are necessary steps but these alone can never cause authority and truth to prevail. Acceptance of divine authority will never occur unless God intervenes; the battle for truth rages only in the mind of the one enlightened to the reality of the conflict; only there will truth prevail. The deciding weapons are spiritual not physical; one's safety is in the battle. In short, the God of creation is the source of all law and justice; without His active intervention, it is impossible to keep His law and uphold His justice.

[1834] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1835] *See Proverbs* 21:31. מוכן (*moo-caan*): *preparation*, from the root כון (*caan*). It is clear from this root's many occurrences in the Old Testament that, in this instance, it refers to "preparation."

[1836] *See* JOHN WINEBRENNER, *The Church of God and Her Ministry*, in DOCTRINAL AND PRACTICAL SERMONS 13 (Churches of God General Eldership 1868) (1860).

[1837] Harvard Law School's recent announcement that it will replace its traditional first year common-law courses with international and comparative-law studies magnifies the need to preserve and renew an understanding of the indispensability of common law and government to liberty. If Harvard teaches comparative law in honesty, it will reveal the advantages of the unlegislated but controlling first principles of the common-law tradition, such as due process.

It is incumbent upon God's people to understand the common-law tradition's first principles. Our federal Constitution and state constitutions are common-law charters; therefore, understanding these occur only as one understands the character of the common law. The Scriptures held the minds of those that refined the rustic ways of the common law and sharpened its elemental attributes. God's Word captured their thoughts by two influences: their inborn ability and tendency to recognize good law and government[1838] and the pervasive infusion of God's Word into their lives and thinking. The common law provides a practical means for translating God's revelation into real justice. Thus, a man does well to learn and ground himself in the principles of the common law. He will benefit from tracing the common law's present application back to the principles from which these stem, that he will understand their purpose and application in present contexts. The common law has arisen from the yearning and ability placed in each individual to recognize divine ideals for law and government; these have been sustained, refined, and reinforced, however, only as the authority of Scripture has been acknowledged.

Right and proper law and government are strategic to the divine mandate to drive injustice from the land. God does not always call those in high places by the world's standards. He chooses the ones He will to do this task. The individual's ability to see and obey God's authority, says B.B. Warfield, is among his most precious possessions because obedience to it uncovers his God bestowed dignity.

§ 6.5
Final Remarks

The American will not stand in fear if he recalls that his freedom obtains because his forbearers rested their decisions upon truth, not upon fear of displeasing another. Each in dependence upon God and according to his conscience boldly spoke, wrote, and associated.

Rome's civil-law state was total; her rulers demanded that all others fulfill their will: (1) by giving worship to Rome's religious forms, (2) by trusting the state for provision and security, (3) by obeying the will of the state, even where lawful private relationships conflicted, (4) by tolerating

[1838] See § 5.1.2 of this book (contrasting the biblical teaching of natural law, according to *Romans* 2:14–15, with scholastic notions of natural law).

their rulers' gratification of pleasure, and (5) by assisting in the buildup of military might upon state demand.

Civil law bases its claim of right to demand obedience to the state's will upon the state's ability to enforce that will. Thus, the fifth demand cited above—to assist in Rome's buildup of military might—was necessary to enforce the other four.[1839] Though these demands were the immediate and visible causes of Rome's decline and fall, they were but symptoms of the prime cause: false law and government resting upon false gods as law's ultimate source, viz., men. Moreover, such demands will alarm the wise.

One must deal with destructive attitudes and habits by pulling their roots clean out and casting them into the fire. "In this world," said Jesus, "you shall have oppression."[1840] Having assured us of such oppression, God has provided right standards to follow in response and promises to preserve us through them. We ignore His standards and procedures at our peril.[1841]

It is our task to adjust our thinking and conform our behavior to the precepts of the common-law tradition, and to teach others. God's people are loyal first to Christ as Savior[1842]—to whose salvation no one can compliment, add to, or improve upon—and to practice His principles in gratitude and betterment of government forms and laws.[1843] God has

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[1839] Edward Gibbon cited five corresponding reasons for the decline and fall of the Roman Empire: (1) the constant attention of the people to a proliferation of empty religious forms, (2) an over-abundance of public handouts, (3) a pervasive and general disrespect for family relationships, (4) an unbridled lust for pleasure, and (5) an outward buildup of military might, while the lethal enemy had become the Roman people themselves.

[1840] *See John* 16:33. *Θλιψις* (*thilpsis*), the Greek term here is best understood as a "closing in" that restricts movement; the discomfort of restriction and even of pressure, i.e., "oppression." Trench likens *thilpsis* to the informal term "little-ease," coined by the English to denote a particular tool of inquisitional torture used during the reigns of the Tudors. "[A]lthough the word "little-ease" is not in our Dictionaries, . . . [it] grew in our early English to a commonplace to express any place or condition of extreme discomfort." RICHARD CHENEVIX TRENCH, SYNONYMS OF THE NEW TESTAMENT 203 n.1 (photo. reprint 1953) (1880). The *little-ease* was a cage "of small dimensions and so constructed, that the prisoners could neither stand, walk, sit, nor lie down in it at full length." *Id.* at 204.

[1841] *See generally Genesis* 1:11–12 (establishing the law of the harvest); *Matthew* 9:38, *Luke* 10:2 (acknowledging God to be the LORD of the harvest); *Matthew* 20:1–16 (Christ teaching, by parable, the LORDSHIP of God over the conduct of the harvest).

[1842] Christ has perfected the work of salvation for His people; He has done all that is possible and no other addition will enhance its quality or effect. One's response in obedience to God's desire gives one confidence, but is not the perfection of one's salvation.

[1843] "If you love me," Christ stated, "you *shall* keep my commandments." *John* 14:15 (emphasis added). This is not a command, but rather, an assertion of fact. Not only does the form of the John's Greek verb bar its interpretation as a command, John the apostle later affirms that Jesus is stating a fact. Jesus gives no orders here but states the certain result of loving Him is obedience. These two concepts—love and obedience—are distinguishable in

blessed Americans with the common-law tradition. The Bible, Wyclif held, is God's tool that will plant the common law's first principles in the mind of the individual. Once Scripture takes firm root in one's mental sod, one will follow its truths and insist upon common law and government. Law and government are products of man's deepest convictions, going to the ultimate concerns of human life, which are no-less-than religious convictions.[1844] In the United States, as all other countries, government forms and laws are the outward evidence of religious beliefs. To the degree Americans are bewildered or mistaken in their religious point of view, to that degree America's law and government will be bewildered.[1845]

Not only is the common law excellent, but is also preeminent. As America grows in numbers, power, prestige, her law and government strives to be efficient at the expense of relationships and freedom. One will stop civil-law infringements upon one's freedom and enjoy common law's advantages by keeping a common-law mindset. Further, one must distinguish between the fundamentals of the common law and what one

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one's mind, but inseparable in one's practice because the two are inextricably bound in a cause-and-effect relationship: love produces obedience as sure as fruit is the inevitable produce of a healthy fruit tree and as birth is the unavoidable result of conception. Faith in, and love for, the Savior unavoidably yields obedience. Stated in the reverse, it is not possible to love the Savior and continue to disobey Him. John later states that anyone claiming to love Christ while disobeying Him, is "a liar and the truth is not in him." The LORD is "the truth," and knowing the truth sets one free to obey the truth. The first and indispensable step in effecting good in one's country is individual entrustment of one's self to the LORD. Such commitment will result as the individual realizes what the LORD has done for him.

[1844] The United States Supreme Court has defined religion. "The term religion," writes Justice Field, "has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for his being and character, and of obedience to his will." Davis v. Beason, 133 U.S. 333 (1890). The Court intended this definition as a rule to discern what qualifies as religion under the First Amendment. The Court's definition, however, has now been altered. Righteous government rests upon that law which finds its ultimate source in the God of Scripture.

Justice Field was no stranger to the Christian and to pagan religions and government. Field's mother Submit Dickinson, descended from a long line of Puritans and his father David Dudley Field, a strict Congregationalist preacher, grounded all nine of their children in the Scriptures. At age thirteen, Justice Field traveled with his sister and her husband to Turkey as missionaries. For years, he lived and traveled in Greece and Asia Minor.

[1845] For example, W.F. Fratcher writes, "Calvin's plan of Church government is bound to influence the form of civil government in any area where it is generally accepted." W.F. Fratcher, "The Government of Geneva Under John Calvin" 24 (1938) (unpublished manuscript, copy on file with author). By the same principle, the Roman Church's imperial form of government has influenced the government forms of those nations that are devoted to the Roman pope. America's fundamental government forms are consonant with her Founders' biblical mindset of church government, most of which were of presbyterian form: i.e., rule by an eldership.

builds upon that foundation. Over the centuries, our common law has allowed human reason to reaffirm, but never to replace, the common-law foundation: eternal precepts. The common law, by diligence and discipline through right process, seeks to find and articulate the right application of timeless principles. To hold the common lawyer's mindset is to move toward a biblical worldview of law and government, establishing justice and insuring domestic tranquility.

The American's present circumstances are as those facing Steven Langton, John Wyclif, and Hugh Latimer. These men rejected civil law's imperial yoke, casting aside notions of humanism in law and government. No vacuum, however, resulted because the common-law tradition had already filled their understanding and stayed familiar in the minds of their countrymen. By contrast, the American's present circumstances are different from those of John Calvin, Martin Luther, and Ulrich Zwingli. These men attempted to throw off the civil-law yoke of imperial Rome. Nevertheless, notions of humanism in law and government remained because civil law had saturated and dominated their culture and remained familiar in their minds. Due to this difference, American tradition will wisely continue to look to her own common-law tradition—not to continental Europe and its progeny—for ideals of law and government. Wisdom asks that we fix our attention upon the records of our courts and government and, thus, know the lessons these reveal.

Hugh Latimer rejected human reason as the final test of true and proper standards for human conduct, stating that upon sensing the Word of God he forsook the doctors and the schoolmen. Latimer's experience is akin to David's, saying that he knew more than all his teachers because he meditated in God's Word. The Scriptures are enough to fully outfit each of God's people for every good work, including the doing of that which is right in the courts and through government.

In addition, common-law ideals work to protect one's freedom to obey God. Since the common law arrived in Britain, the ideals of Scripture have remained at its foundation, informing its precepts. James Madison and John Locke are examples of men demonstrating that the study and knowledge of Scripture has produced the best tradition of American law and government.[1846]

[1846] James Madison, called the chief framer of the Constitution, entered the College of New Jersey (now Princeton) intent upon becoming a minister of the gospel; his favorite subject was Old Testament Hebrew. Completing the four-year course of study in three years, Madison kept paper, pencil, and a candle burning by his bed throughout each night that he could grasp every opportunity to record unexpected thoughts relating to his studies. His unrelenting and intense study, however, weakened his health, convincing Madison to

Both Madison and Locke thus informed by and saturated with Scripture, have benefited American ideals of law and government without measure. Many others of like kindred mind and spirit, less well known, have nonetheless been mighty, rightly informing the minds of posterity in favor of Christian freedom.

One's station in life, lack of formal education or economic condition is no barrier to one's ability to shape the practical future of freedom. Possibly the most influential person in history—among both men and women—to the effecting of right law and government was hampered by the stigma, oppression, and poverty of slavery: Jochebed,[1847] the mother of Moses. Sincere students of Scripture, however, often overlook her life and deeds.

Though Moses learned the arts of the Egyptians, he returned to that which his mother had taught him of his ancestral roots: the covenant relationship of God with his people Israel. Scripture never gives Moses' precise age when Jochebed's duties as Moses' wet nurse and nanny ceased, but the terms Moses used to describe this stage of his life indicate that Jochebed raised Moses to full physical manhood before she brought him to Pharaoh's daughter for official royal adoption.[1848]

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forego Christian ministry upon his graduation. As had many other men of influence in his day, Madison studied under theologian John Witherspoon. John Locke, one of those to whom history attributes the sound articulation of the fundamentals of American government, throughout his life remained a steadfast student of biblical theology. Drawing from *Genesis*, Locke concluded, contrary to Filmer, that God never grants authority to any one man or group of men in order to dominate any other.

[1847] The Hebrew יוכבד conjoins (יו: *Yo*), the abbreviated form of יהוה (*Yaweh*: God's covenant name) with כבד (*cavodth*: glory); resulting in "Jochebed," meaning "Yaweh is glory." Since "Jochebed" includes *Yaweh*, the unspoken covenant name of God, the Hebrews must have known this personal name before the time of Moses and his experience at the burning bush. *See Exodus* 3:14. Some, without justification, assume that we ought never understand the name Jochebed in this sense.

[1848] Pharaoh's daughter gave the infant Moses to his mother Jochebed with orders to "take this child away and nurse him for me, then I will give you wages." *Exodus* 2:9. Then, in *Exodus* 2:10, Moses writes: "And the lad [Moses] grew, and she [Jochebed] brought him in to the daughter of Pharaoh, and he became to her for a son." The verb translated *grew*, גדל (*gadal*), "never refers to anything being numerous, only to being great in size." 1 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 316.

In the plural form of both the Hebrew and cognate languages, *gadal* means to twist together, as is done in making rope. When referring to the rearing of children, such as Jocabed's care of Moses, it refers to the binding of the sinews of the body wits of the soul into the full stature and strength of a man. Jochebed, it appears, held the foremost influence in Moses' life during his formative and impressionable years, while he was stretching to full stature.

That Moses' natural mother Jochebed stayed with Moses as long as was possible, is a sound belief. It is reasonable to hold that the principles Jochebed gave to Moses shaped all that he thought, did, and wrote, working immeasurable benefit to mankind. God, in His

Whether or not one concedes that Christianity is the foundation of the common law, it remains incontrovertible that the common law's ideals are consonant with Scripture. Even where a country places trust in men of the state, ceasing to observe the common law's protections, the common law's ideals remain, waiting to be—as they have so many times before—affirmed and put into practice. If a people lack the knowledge that comes from practicing the principles of Scripture (experiential knowledge[1849]), says Hosea, that people will perish.

The common law's advantage is that it yields a better product. It does so because it insists upon individual and independent loyalty to law above men; proper allocation of authority and diffusion of power, including checks and balances; adversarial, public, and oral proceedings, exposing truth in the courts and government and empowering jurors to reinforce loyalty to law above any mere man or men. As the American enjoys the fruit of his common-law tradition—protection of the right to life, to liberty, to freely choose and define relationships and property ownership, and the resultant abundance—it behooves him to remember that he must tend the tree so that it will bear again, year after year. The hand of Providence has planted our common law near running water; the Word of God has informed and upheld it.[1850] As long as the American keeps his common law fixed to this life source, it will never dry out and wither, but will keep on giving its good as its roots reach and its branches spread.

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providence, used Jochebed to mold the mind, will, and soul of the man God used to give to His people His Torah: the foundation of His Word; the fundamental written expression of God's character and will.

[1849] ידע (*yada*): the intimate knowledge of experience that comes only by doing the will of God. *See Hosea* 4:6.

[1850] See *John* 6:68, where Peter the apostle acknowledges that Jesus holds the words of eternal life (*'ρηματα ζωης αιωνιου εξεις*). The tone and character of this phrase makes it definite; being anarthrous, it emphasizes the qualitative aspect of Christ's spoken words and the quality of life that flows from them. *See* ARCHIBALD T. ROBERTSON, GRAMMAR OF THE GREEK NEW TESTAMENT IN THE LIGHT OF HISTORIC RESEARCH 794 (1923), *quoted in* H.E. DANA AND JULIUS R. MANTEY, A MANUAL GRAMMAR OF THE GREEK NEW TESTAMENT 150 (1955). Moulton concurs, "[F]or exegesis, there are few of the finer points of Greek which need more constant attention than this omission of the article when the writer would lay stress on the quality or character of the object." MOULTON, PROLEGOMENA TO THE GRAMMAR OF NEW TESTAMENT GREEK 83, *quoted in id.* Earlier, in *John* 6:63, Jesus states that His Words are life. Any thing or person -not sustained by the Word of Christ is dead because to be separated from the Word of God is to be estranged from the life of God. Separation from God's life spells death. *See John* 6:63, 68. The Hebrew מות (*muth*) signifies *separation* of one thing from another, such as man's separation from God. *See, e.g., Genesis* 2:17, 3:3.

Appendices

—Including Twenty-Seven Points-of-View on Twenty-Seven Points—

1
The Miner's Law: Law Men Discover by Nature

—A Study of Natural Law Working—

In the mining States and Territories a peculiar species of common law, relating to mining rights and titles, has sprung up, having its origin among the miners, but recognized and enforced by the courts.[1851]

Introduction

From time out of memory until the today, neighborhoods of miners the world over have each set up like bodies of law and due process to protect their mining land and mineral rights,[1852] and to govern their special

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[1851] COOLEY, *supra* note 61, at 26. Paul the apostle argues that men without knowledge of God's law discern, from time to time, right from wrong:

> For when the nations that have not law, by nature from time to time do the things contained in the law, these having not law, are to themselves a law; which proves that impression of the law's [is] written in their desires, their conscience testifying with their desires. Also, between one another they have thoughts of legal accusations and legal defenses.[1851]

Romans 2:14–15. See generally § 5.1.2 of this book (discussing natural law as *Romans* 2:14–15 presents it).

[1852] Mineral rights fall within the common-law rights of property:

> [At common law], the right of property . . . [is] that sole and despotic dominion which one man claims over the external things of the world, in total exclusion of the right of any other individual in the universe . . . [It] consists in the free use, enjoyment and disposal of all [a person's] acquisitions, without any control or diminution, save only by the laws of the land.

relationships and stations as miners. Miners call this body of law the Miner's Law. From the earliest recorded days, following discovery of valuable mineral deposits, men have gathered in the areas of discovery to prospect and worry from the earth her riches. Likelihood of mineral discovery has drawn men from all walks of life, most all of which have been ignorant of the Miner's Law. Nevertheless, through native sense and driven by desire to protect property rights, prospectors and miners have set up courts of fixed jurisdiction and procedure, laying down rules fitting their needs: protection of life, limb, property, and a fair opportunity for each man to realize profit from his diligence. In mineral-rich lands through time and the world over, these rules have endured, remaining, at bottom, unchanged.

The Miner's Law is a significant manifestation of the common-law because it reveals that the divine imprint of man's sense of right and wrong extends beyond substance to procedure and due process, i.e., fair play. Over the centuries and among all nations, its standards have arisen from miners by nature; by common consent, miners have enforced these standards, without material variation, from time to time and from place to place. The Miner's Law, as a slice of American common law, provides modern examples of how our common-law tradition arises naturally from individual freedom to chose and enter relationships concerning rights in property and property in rights.[1853]

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2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3 (San Francisco, Bancroft-Whitney 1890). In the common-law tradition, "The laws of the land"—the final phrase of Blackstone's definition of property—signifies due process. At common law, government shall never diminish the "sole and despotic dominion" that the owner enjoys over his property, unless according to due process of law, i.e. "the laws of the land." "The words, 'due process of law,'" said the Supreme Court, "were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta* [ch. 45]." Murray's Lessee v. Hoboken & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (Curtis, J.). The Constitution's Takings Clause reinforces Blackstone's affirmation of property rights at common law. *See* U.S. CONST. amend. V. The common-law tradition, Magna Carta, Blackstone's *Commentaries*, and the Constitution each echo the principle laid down in 2 *Samuel* 24:20–24. Without judicial recognition of private property rights, freedom fails.

[1853] *See generally* W.N. HOFELD, FUNDAMENTAL LEGAL CONCEPTIONS 23–124 (1923) (suggesting that property is a collection of rights, privileges, powers, and immunities with respect to a thing rather than the thing itself); *see also* 1 Restatement of Property 3 (1936), *cited in* ROUNDS, *supra* note 363, at 150.

Appendices

I. Ancient Origins of the General Mining Law of 1872: Miner's Law Becomes the Mining Law

[Among] the many arts and sciences of which the miner should not be ignorant . . . is the law, especially that dealing with metals, that he may claim his own rights, that he may undertake the duty of giving others his opinion on legal matters, that he may not take another man's property and so make trouble for himself, and that he may fulfill his obligation to others according to the law.[1854]

On 28 May 1288, King Edward I. of England sent two justices to Ashbourne with a royal writ quo warranto to inquire "by what authority" the laws and customs of the miners there operated. Upon arrial, these justices summoned a jury to "inquire of the liberties which our miners do claim to have, by what means and how, and from what time and by what warrant they were obtained."[1855] The Jury found, and the justices recorded, that the Miner's Law at Ashbourne had been observed for "time out of memorie."[1856]

[1854] *See* GEORGIUS AGRICOLA, DE RE METALLICA 3–4 (Herbert & Lou H. Hoover trans., 1950). At common law, the owner of all rights in a parcel of land (ownership in fee simple) may, upon selling that parcel, sever and the minerals rights and exclude them from the purchaser's *bundle of rights* in that land. This, coupled with the fortuitous and sometimes unexpected presence of minerals in any given piece of land, has made a tension between the rights of landholders and the activities of miners. This strain runs as taut thread through mining history. *See* ROBERT F. MACSWINEY, THE LAW OF MINES, QUARRIES AND MINERALS 41–42, 282–85, 479–99, 551–68 (London, Maxwell & Son 1884).

[1855] *History of Mining Law*, *in* THE MINING JOURNAL, LTD., 3 June 1988. See generally *id*., for an overview of mining law through the centuries. *See also generally* ENCYCLOPAEDIA OF THE LAWS OF ENGLAND, *Mines and Minerals* 245 (1908) (describing the Stannary Courts', "an ancient immemorial jurisdiction"). *See also* BAINBRIDGE, MINES AND MINERALS 543–75 (London, Butterworth 1856). Edward I. recognized the right of the tin bounders of Cornwall to be subject suit only in the jurisdiction of their own Stannary Courts. Smirkes Rep. of Vice v. Thomas, app. at 14. *See* 33 Ed. I. *See also* MACSWINEY, THE LAW OF MINES, QUARRIES AND MINERALS 417 (London, W. Maxwell & Son 1884). Ten years later, in 1288, Edward I. called an Inquisition in Ashbourne for the empanelling of a jury of 24 true men to carry out the laws. Edward Manlove put these laws into verse under the title *Rhymed Chronicles of Edward Manlove*. The common law sought not to overturn ancient custom but, rather, sought to recognize it, unless in clear derogation of the first principles of the common law.

[1856] *History of Mining Law*, *in* THE MINING JOURNAL, LTD., 3 June 1988 (archaic spelling in original). *See also* AGRICOLA, *supra* note 1854, at 84–85. The phrase *time out of memorie* and its modern equivalent *immemorial antiquity* are legal terms of art at common law, bearing precise meaning: the time before accession to the throne of Richard I. on 23 September 1189. This is not the date common law began, but a technical statute of limitations date—"capricious as all such statutes must be"—back of which the common law will not look for precise authority. 1 FREDERIC WILLIAM MAITLAND, *Why the History of English Law is not Written*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 30

Lou Hoover and her husband Herbert Hoover—later to become United States President—saw mining law as not only an important branch of property law, but also as a revealer of prevailing attitudes at a given time and place concerning the balance of power, or lack thereof, between rulers, the state, landholders, and miners:

> There is no branch of the law of property of which the development is more interesting and illuminating from a social point of view than that relating to minerals. Unlike the land minerals have ever been regarded as a sort of fortuitous property, for the title of which there have been four principle claimants—that is, the Overlord, as represented by the King, Prince, Bishop or what not; the Community or the State, as distinguished from the Ruler; the Landowner; and the mine operator to which class belongs the Discoverer. The one of these that possessed the

(1911). After receiving the findings of the Jury there empanelled the justices dispatched to Ashbourne put in writing fourteen accepted practices of the miners. By empanelling the Jury in the common-law tradition—as also later holdings of the Supreme Court reveal concerning the Miner's Law as applied in the California mining camps—, these justices discovered and ratified the Miner's Law.

The findings concerning the antiquity of the Miner's Law is reasonable. Indeed, some have held that *Tarshish* (תרשיש) of the Hebrew prophet *Jonah* (*circa* 800 B.C.) is best translated *Tinland*, further holding that "Tarsish" signifies the tin fields of Cornwall, England, where free miners operated from before the time of Jonah the prophet at least until World War II. *See also* WILLIAM GESENIUS', HEBREW AND CHALDEE LEXICON OF THE OLD TESTAMENT 875 (Samuel P. Tregelles trans., 1981) (1847). *Ezekiel speaks* of tin from Tarshish (600 B.C., *Ezekiel* 27:12). During the late ninteeth and eary twentith centuries, hundreds of tin binders from Cornwall came to Grass Valley, California, where their knowledge of deep hardrock mining enabled the profitable operation of the Empire Mine, world's largest underground gold mine, and North Star Mine. The Spaniards, however, also anciently mined tin in Spain, and this may be the biblical reference. *See* John C. Lacy, *Historical Overview of the Mining Law: The Miner's Law Becomes Law*, *in* T. S. ARY & ET. AL. MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS. WASHINGTON, D.C.: NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 13, 14 (1989. In the fifth century B.C., Herodotus provides strong evidence of Cornwall's tin mines calling Britain *Kassiterdeς* (*Cassaterides*), meaning "tin islands." *See* MARIO PEI, THE STORY OF LANGUAGE 60 (1949). Lacy cites *Job* 27:12 as revealing a source of ancient mining. Many students of ancient Near Eastern literature date *Job* before the Pentateuch (1450 B.C.).

President and Mrs. Herbert Hoover point out early Scripture's references to tin (*Numbers* 31:22; *circa* 1200 B.C.), Cf. AGRICOLA, *supra* note 1854, at 412. President Herbert Hoover and his wife Lou Hoover met in a Stanford University laboratory, while studying mining engineering there. Working together, they later became the first translators into English of Agricola's sixteenth-century Latin treatise *De Re Metallica*.

> dominant right reflects vividly the social state and sentiment of the period.[1857]

Of these four claimants, history reveals that the dominant party holds the mineral title.[1858] Since the dawn of recorded history, however, and in every place regardless which of these held mineral title, the miner has been "ever in a minority influence as well as in numbers, has been buffeted from pillar to post, his only protection being the fact that all other parties depended upon his exertion and skill."[1859] Nevertheless, in spite of their dependency, these other parties, if left unchecked, will consume their host, the independent miner.

Mining is among the oldest economic activities in North America. Long before the British settled the eastern seaboard, the Spanish and American tribes had probed deep into what is now the Western United States and had reaped handsome profits from gold and silver deposits.[1860] American mining terminology reflects this Spanish mining tradition.[1861] By the eighteenth century, mercantile doctrines came to dominate European economic policies, inciting the countries of Europe to seek precious metals in the New World.[1862]

Though early mining occurred in the southern Blue Ridge and Smoky Mountains,[1863] on federal lands in the galena fields of the un-glaciated

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[1857] AGRICOLA, *supra* note 1854, at 82. See generally 2 ALLAN CHESTER JOHNSON, PAUL ROBINSON COLEMAN-NORTON, FRANK CARD BOURNE, CORPUS JURIS ROMAI 177 (1961), for a translation of an early second-century Roman mining-claim regulation. Discovered near Aljustrel, Portugal in 1906, the regulation is inscribed on a bronze tablet, decreeing that all original title to minerals is the Roman state and that upon one's neglect or abandonment of one's mineral claim, title reverts to the state.

In contrast to the Roman mining codes are the free mining districts of England. For example, near Gloucester is "the strange and independent world of the Forest of Dean." BENSON BROBRICK, WIDE AS THE WATERS 73 (2002), *quoting* GEOFFREY HINDLEY, ENGLAND IN THE AGE OF CAXTON 127 (1979). The rights of the free miners of the Forest of Dean date back 700 years. Anyone born in the Forest, within the Hundred of St. Briavels, who has mined in one of the coal mines there for at least a year and a day, has authority to open his own mine in Forest of Dean mining district. Few free miners work the district today. Forest of Dean mines are drift mines (tunnels excavated into a hillside); the miners sell their coal locally. The Forest of Dean free miners enjoy additional ancient rights, such as the right to graze pigs in forest during the autumn months, where they feed on the acorns, and the right to run sheep in the Forest.

[1858] *See id.*

[1859] *Id.*

[1860] Evidence of early Spanish mining north of the Mexican border is abundant. The writer, while prospecting in Arizona, found seventeenth-century Spanish silver diggings far out in the desert wastelands and encountered old Spanish gold mines that were reactivated.

[1861] Cf. PALMER C. SWEET, GOLD IN VIRGINIA (1980).

[1862] Cf. *id.*

[1863] *See id.* at 109.

area of northwestern Illinois, and in the saline mines of the Wabash Valley,[1864] the first clear expression of American mining law arose from the California Gold Rush of 1849. Moreover, like the free miners of Ashbourne, the Forty-Niners' authority sprung from eternal principles.

Straightway after Mexico's defeat and the cession of its holdings north of the Gila River to the United States,[1865] the new American governor declared Spanish mining law no longer operative in the California Territory. He neglected, however, to put any other law in its place,[1866] leaving the miners to govern themselves; they did. Furthermore, the United States government, by failing to enact mining legislation, sanctioned the miner's self-rule. Congress wanted control of the California gold fields and miners, but did not come to agreement of how to do so. The miners, capable of self-government, were un-inclined to look beyond themselves for law. Besides, from the miner's view, Congress was way off in *the States*—too far away for any serious thought. Government's passive stance toward the miners was the better part of valor on the part of California Governor Mason and Congress: in California, miners outnumbered federal troops ten to one.[1867] Thus, Congress saw the futility of any federal attempt to force its will upon the miners and the humiliation of any failed attempt.

The California Gold Rush occurred concurrent with Mexico's cession of California to the United States. According to the court's finding in *Moore v. Smaw*, the United States owned all gold and silver present on federal lands acquired from Mexico. Moreover, this federal ownership continued, without impairment, into Congress's admission of California into statehood.[1868] Congress knew of its jurisdiction over California gold and silver, but chose the path suggested by Senator Benton of Missouri, "Lay them [the mines] open . . . to the man that has stout arms and a willing heart . . . Not sales but permits is the proper mode . . . The lawgiver must go with the current; and then he may regulate it . . . ."[1869]

[1864] *See id.*

[1865] *See id.*

[1866] *See* CONG. GLOBE, 30th Cong., 2d Sess. 254–59 (1849).

[1867] *See id.* at 19. By the end of 1849, the United States had garrisoned only 10,000 Federal troops the San Francisco Bay area. By the winter of that year, however, at least 100,000 free miners had reached California, were increasing daily and most, doubtless, armed. According to the Congressional record, Congress feared that any federal attempt to use force, or even threat of force, to ensure federal policy was doomed to fail and bring embarrassment and loss of respect, worldwide.

[1868] *See* 17 Cal. 199 (1861).

[1869] CONG. GLOBE, 30th Cong., 2d Sass. 113 (1849).

Appendices

In 1865, the United States Supreme Court took notice of the Miner's Law, calling it "a novel and peculiar question of jurisdiction for this Court." The Miner's Law, said the Court, is "a special kind of law—*a sort of common law of the miners* . . . clothed with dignity by the conception of the immense social results mingled with the fortunes of those bold investigators . . . ."[1870] Senator Stewart of Nevada held this common law of the miners to have sanction of Congress, even though "no statutes had been enacted to give it force."[1871] Over time, "a series of wise judicial decisions molded these regulations and customs into a comprehensive system of common law . . . The same system has spread over all the interior states and territories where mines have been found . . . ."[1872]

The enactment of the Mining Law of 1872 was not merely permission as distinguished from positive law (legislative command), but rather, was a ratification of the miner's common-law self-regulation: the Miner's Law arose naturally from the miners, the courts recognized it to be law, and Congress then certified its standards through enactment. Thus, neither the miners, nor the courts, nor Congress made the Miner's Law; rather, the miners discovered it, the courts recognized it, and Congress confirmed it.

Miners in each of California's several gold fields organized their areas into separate mining districts. These districts shared a common thread of standards and practices, enabling discovery and development of mineral deposits and based upon four related concepts: *self-initiation*, allowing unfettered *access*, and *diligence*, resulting in *tenure*. By enacting the General Mining Law of 1872, Congress recognized these four fundamentals to be indispensable to mineral discovery and production, and ratified the miners' observance of them. Production of minerals depends upon *discovery* and *development*: discovery is the source of title and development (working the property) is the condition of the continuance of that title. Furthermore, discovery depends upon *self-initiation* and *access*; development depends upon *diligence* and *tenure*.

Since men have sought after minerals and mined, they have rested their mining laws on these four cornerstones. These have always been the underpinnings of the Stannary Convocations of the free tin miners of Cornwall,[1873] the High Peak District practices, the Barmote Court of

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[1870] Sparrow v. Strong, 70 U.S. (3 Wall.) (1865) 97, 100 (emphasis added). This opinion, and its appendix, describes well the common law of the miner.

[1871] Cong., 2d Sess. 254–59 (1849).

[1872] *Id.*

[1873] *See* H.W. Halleck *Introduction* to J.H.N DE FOOZ, FUNDAMENTAL PRINCIPLES OF THE LAW OF MINES vii § 5 (H.W. Halleck trans., 1860) (n.d.). *See also* HALLESBURY'S LAWS OF

Derbyshire,[1874] the practices of the Burgermeisters of Saxony, the Spanish colonial ordinances of New Spain and Peru, and the early practices of the mining districts of the Missouri lead belt.[1875] The California gold miners, although ignorant of the customs of mining law, recognized the strength of these four cornerstones and with deliberation organized their separate mining districts, their claim-recording officers, and their miners' courts in respect of these.

In time, the state courts increasingly recognized the common laws of the California miners to control, refusing to impose judicial or legislative glosses, even taking exception to such time-honored legislation as the Statute of Frauds. In *Gore v. McBrayer*,[1876] plaintiff Gore and defendant McBrayer had made an oral agreement to prospect for quartz and enjoy equal interest in any claims staked, but they never put their contract to writing. McBrayer then discovered quartz deposits and located a claim according to the laws and customs of the miners: he posted a written notice on the claim with Gore's and his name on it. Later, however, McBrayer tried to exclude Gore from any rights in the claim by invoking the Statute of Frauds, which says that unwritten agreements concerning rights in real property (such as mineral rights) are unenforceable. Justice Baldwin found that if the Miner's Law uses no Statute of Frauds, "what [has] the Statute of Frauds to do with such a case? . . . [U]nless indeed the rules or customs . . . recognized among miners, make such a notice necessary."[1877] Justice Baldwin then cinches the validity of the miner's customs and self-government:

ENGLAND 595–96 (Lord Hailsham ed., 1980). In keeping with their customs, the independent Cornish tin miners' (called tin *binders* or *bounders*) peculiar court held original jurisdiction over disputes concerning the tin mines, miners, and strangers in intercourse with the mines and miners. Initially these courts embraced common law and equity, but criminal jurisdiction has been in abeyance for several centuries. See Adams v. Lord Warden of Stannaries (1633) Cro. Car. 333; Charter 33 Edw. I., where the court exacts jurisdictional limitations upon actions between miners brought to the court with the words: *exceptis placities terrae vitae et membrorum* (except actions relating to land, life, and limb), *cited in id.* and *set out in part in* Newton v. Nancarrow, 15 Q.B. 144 (1850); R. v. East Powder Magistrates Court, *ex parte* Lampshire, 1 Q.B. 616 (1979).

[1874] *See also* HALLESBURY'S LAWS OF ENGLAND 596 (Lord Hailsham ed., 1980). The Barmote Court retains jurisdiction in Highpeak and Derbyshire. The name *Barmote* "is derived from '*Bargh-mote*.' *Bargh* is a mine or mountain where out of metals are digged. Privileges of the miners in Highpeak were ascertained and confirmed at an inquisition held at Ashbourne in 1287 . . . ." To the letters, the Anglo-Saxon *barmote* conjoins "bergh" (mountain) and "mote" (assembly).

[1875] *See* AGRICOLA, *supra* note 1854, at 82.

[1876] *See* Gore v. McBrayer, 18 Cal., at 598 (1861).

[1877] *Id.* at 589. Enacted by Parliament in 1677 (29 Car. 2, ch. 3), the Statute of Frauds' major provisions have survived in the United States. The Statute modified the common-law standard by elevating technicalities of written evidence of contracts above other evidence.

> We cannot inquire into the regularity of the modes in which these local legislatures or primary assemblages act. They must be judges of their own proceedings. It is enough that the miners agree . . . upon their local laws, and that these are recognized as the rules of the vicinage [the mining district] . . . .[1878]

Both the courts and legislatures confirmed the Miner's Law:

> At first these regulations rested entirely on the consent of the miners, but they later came to be recognized by the courts as custom. State and territorial legislatures respected these rules and specifically recognized them in their civil codes, while Congress, by the general mining acts of 1866 and 1872, confirmed these local usages.[1879]

In keeping with the fundamental precepts of common law, the local miners' courts, state and national legislatures, and the United States Supreme Court saw their role to discover, take notice of, and reaffirm the law that had arisen among the miners, who, by common consent, practiced it. From mining district to mining district, and as miners set up new districts, they kept the four cornerstones of the Miner's Law—self-initiation, access, diligence, and tenure—by observing ten principles:

First, at a known place within the then unbounded mining district, upon ample notice to all claimants, with one miner presiding and another recording the proceedings, the miners held a meeting. Justice Baldwin of the California Supreme Court recognized the findings of such meetings as binding—if the miners had followed due process by giving notice of the meeting to all interested parties. The miners' adherence to due process brought their proceedings and standards within the realm if the common law, demanding recognition of the state and federal courts.

Second, at such a meeting, the miners laid out the boundaries of their mining district; named it after its locality, discoverer, or "whatever

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Although the provisions of the Statute persist, American courts have trended away from strict adherence to its technicalities by recognizing the competence of other evidence proving or disproving the existence of the contractual relationship in question.

[1878] *Id.*

[1879] BENJAMIN H. HIBBARD, A HISTORY OF PUBLIC LAND POLICIES 516 (1965).

incident or fancy dictate[d]."[1880] These boundaries were important because territoriality established the limits of the authority of the mining district's court. Thus, to alter a district's boundaries was alter jurisdiction (the right to act). Any attempt to do so was, therefore, unlawful, without a meeting of all the claimants upon good notice.

Third, the Miner's Law gave authority to the discoverer of a new lode (hard rock deposit, *in situ*) or placer (nuggets or smaller deposits loose in a stream bed or wash) deposit to stake a double claim in the new mining district, organized around the new deposit. By providing this incentive for new discovery, the Miner's Law fully preserved its ancient ideal.

Fourth, the Miner's Law authorized each prospector to locate only one claim within the mining district. The California Supreme Court, however, eventually held that any rule limiting one's *purchase* (as opposed to one's discovery and location) to only one claim is void because such a limit violates a first principle of the Miner's Law:[1881] incentive to risk the expense of prospecting and discovery demands the unfettered right of the discoverer to sell his claim for profit to whomsoever he pleases. In a word, any limitation on a miner's right to purchase is also a limitation upon the prospector's right to sell, both of which removes incentive for mineral discovery.

Fifth, the Miner's Law required of those locating (staking) claims on federal land, *legal capacity*, namely, citizenship. The Miner's Law allowed the non-citizen to locate and hold claims only if he intended to become a citizen of the United States. In spite of this, mining districts persisted in excluding those of Mongolian extraction from holding claims. One mining district court held: "Chinamen shall not be allowed to own claims in the district either by purchase or preemption."[1882]

[1880] GREGORY YALE, LEGAL TITLE TO MINING CLAIMS AND WATER RIGHTS IN CALIFORNIA UNDER THE MINING LAW OF CONGRESS OF JULY (1865) 73 (San Francisco, A. Roman & Co. 1867).

[1881] *See* Prosser v. Parks, 18 Cal. 47 (1861).

[1882] *New Kana Ka Camp Mining District of Tuolumne County, California,* art. 7, *in* YALE, *supra* note 1880, at 76. Miners, by adopting a like rule in the Arizona gold districts, excluded Mexicans, but had difficulty enforcing the exclusion, being unable to frame a definition of *Mexican* that allowed the courts to ascertain with surety whether a man or woman was a Mexican. *See* THE UNITED STATES MINING LAWS AND REGULATIONS THEREUNDER AND STATE AND TERRITORIAL MINING LAWS, TO WHICH ARE APPENDED LOCAL MINING RULES AND REGULATIONS 254 (Report of the 10th United States Census, Washington, 1885).

The exclusion of Mexicans from holding mining claims is ironic because a Mexican—his name long forgotten if ever known—of the Pauline Weaver party made the first and most spectacular gold discovery in Arizona's interior in the Bradshaw Mountains atop Rich Hill. Upon organizing the Weaver Creek District, the miners made one exception: "No citizen of Mexico shall hold or work claims in this District except the boy Lorenzo Para, who is one of

Sixth, the miners, in meeting, agreed upon a standard claim size. Depending upon whether the district was placer or lode, located in a streambed or canyon, on a mountainside or meadowland, or a combination of these, claim size varied from mining district to mining district, but never much. In all events, one principle was constant among mining districts: the standard claim size must be reasonable. The courts recognized the principle of reasonableness in light of local terrain, even in districts yet unorganized.[1883] The agreed judgment of the miners of any given district created a strong presumption of reasonableness, leaving a heavy burden upon the challenger of the presumption.

Seventh, to establish a valid claim, the claimant must, first, post a written claim location on the claim, and, second, mark the claim boundaries in a way reasonably calculated under the circumstances to notify other prospectors of his rights. To satisfy this standard, such notice required, at minimum, the name of the locator or locators (if a mining partnership[1884]), and a written description of the claim's boundaries. The metes and bounds method was concrete, clear, most often used, and, therefore, accepted by the courts. Posting one's claim put the world on notice of the one's mineral rights.[1885]

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the original discoverers . . . ." Even Weaver himself was only half white. *See* Brent A. Winters, Historical, Geological, and Engineering Study: Golden Goose Placer Claims in the Weaver Creek Mining District (3 May 1991) (on file with author). *See also* M. KATHERIN CROMBIE, ET AL, RICH HILL: THE HISTORY OF ARIZONA'S MOST AMAZING GOLD DISCOVERY 32–43 (2002); and LAMBERT FLORIN, GHOST TOWNS OF THE WEST 148–50 (1977). Two graveyards exist just below Rich Hill in Weaver Creek Canyon, Weaver Creek Mining District, Arizona: one for whites within the town of Weaver and the other for Mexicans, Chinese, and all others, up the mountain side to the east, between a half to a quarter mile.

[1883] *See* Brown v. '49 and '56 Quartz Mining Company, 15 Cal. 153 (1860).

[1884] At common law, the *mining partnership* is a species of the common-law general partnership found in American oil fields and mining districts, but with a difference: the mining partnership interest is transferable without destroying the partnership relationship. Often, prospectors formed mining partnerships from the common-law *grubstake agreement*. However, as mining-partnership partners transferred and further divided and distributed their interests, the partnership became bottom-heavy, impeding its ability to act in quick response to legal challenges and economic opportunities. Such partners, therefore, often rearranged their relationships into a *common-law trust* by transferring title of their property rights (mineral fee) to a single trustee or handful of trustees.

[1885] Early on, in order to put claim jumpers on notice, each mine claimant stowed his location notice in a tobacco tin nailed to a post set on his claim; this remained a common practice until recent decades. Nowadays, miners often post mining location notices in a fruit jar screwed into its lid, which the claimant has nailed to a post. *See* ROBERT P. PRUITT JR., DIGEST OF MINING CLAIM LAWS 8 (1977). The language of location notices need only put the world on fair notice of property rights. The legal sufficiency of location notice is not a technical matter of form, but of substance. The following early example passes legal muster:

> All and everybody, this is my claim, fifty feet on the gulch, cordin [according] to Clear Creek District Law, backed up by shotgun

Eighth, prospectors made record of their discoveries by recording their notice with the mining district's elected recorder. Before the organization of counties and election of county recorders, all mining districts required a central recordation of one's claims on the rolls of the mining district's recorder. The recorder kept the records of claims safe, in good order, and accessible to all. Records of claims were admissible as evidence to prove transfer of claims.[1886] In accord with common-law principles of adverse possession, notorious possession overrode any lack of recording.[1887] Miner's laws from other places and times, including the General Mining Law of 1872, require posting of notice at the claim, followed by a timely recordation of the claim so located, with the official keeper of records. Today, the General Mining Law requires the locator to post his notice at the claim, file it at the county recorder's office and at the designated federal office.

Ninth, the Miner's Law provided conditions of claim forfeiture. *St. John v. Kidd* recognized forfeiture, according to the Miner's Law:[1888] "the loss of a right to mine a particular piece of ground . . . by neglect . . . [or by failure] to comply with . . . acts which must be done in order to keep alive the right . . . ."[1889] Further, forfeiture differs from *abandonment*, which is a matter of intention, a subjective standard. By contrast, forfeiture was, and is, determined under a purely objective standard of strict liability: the miner either outwardly complied with forms and rules, —which included, at bottom, working his claim in further prospecting, mining, or preparing to mine—or he forfeited his claim. Yale captures the standard neatly, "The claim must be worked by the owner or he must surrender it to the next comer . . . ."[1890] The law of claim forfeiture remains in line with the teaching of the common law, demanding that the

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> amendments. Any person found trespassing on this claim will be persecuted [prosecuted] to the full extent of the law. This is no monkey tale butt [but] I will assert my rites [rights] at the pint [point] of the sicks shirter [six-shooter] if legally necessary so taik [take] heed and good warnin [warning].

C. CHINN, LAND LAWS OF MINING DISTRICTS 558 (1984), *quoted in* John Umbeck, *Might Makes Right: A Theory of the Formation and Initial Distribution of Property Rights*, Economic Inquiry, vol. 19 (Jan. 1981) at 50.

[1886] *See* St. John v. Kidd, 26 Cal. 264 (1864).

[1887] *See* English v. Johnson, 17 Cal., at 108, 115–16 (1860), "The taking up of mineral land in pursuance of the mining regulation of the vicinage gives possessory title to the claims just as an entry in the land office . . . [even though] the party does not enter . . . under a paper title."

[1888] *See* St. John, 26 Cal., at 264.

[1889] *Id.* at 271.

[1890] YALE, *supra* note 1880, at 81.

owner, not attempting to work profit from his property, must yield title to the one willing to do so. The Spanish Mining Code[1891] also followed this understanding of forfeiture. To prevent forfeiture, the claim holder must fulfill the forms of the law. Thus, the forms of forfeiture make out a prima facie case of intent; if a party overcomes that presumption, the claim holder is said to have *abandoned* the claim.

Tenth, as the tin binders of Cornwall, the early California miners set up a miner's court in each mining district by empanelling a Jury of miners and empowering them with judgment. The California miners' courts were in like-kindred spirit to the Anglo-Saxon tradition:

> Miner's courts were organized on the spot, by men selected from among the miners, acquainted with their simple laws . . . to determine disputed rights . . . free from complicated forms . . . with little expense, preserving substantial justice . . . [Thus, p]rolonged litigation is prevented and order is preserved. By selecting miners [for jurors], judgment was by the miners' peers, and this common-law right was preserved.[1892]

II. The General Mining Law of 1872

The real mining Code, as far as it can be traced by legal earmarks, has sprung from the customs and usages of the miner's themselves . . . Most of the rules and customs constituting the Code, are easily recognized by those familiar with the Mexican ordinances, the Continental Mining Codes . . . the Stannary Convocations among the Tin Bounders of Devon and Cornwall, in England . . . These regulations are founded in nature, and have a common origin . . . guarding against every form of monopoly, requiring continued work and occupation in good faith, to constitute valid possession.[1893]

Constitutional Authority

The United States Constitution, says the Supreme Court, gives to Congress only, the power of unfettered choice to transfer to another

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[1891] See generally ORDENANZES DE MINERIA (1783). *See* LACY, *supra* note 1856, at 16, for an explanation of this Code.

[1892] YALE, *supra* note 1880, at 81. *See* LACY, *supra* note 1856, at 22–27, for a more recent evaluation of these 10 common facets of the Miner's Law.

[1893] *See* LACY, *supra* note 1856, at 777. *See also* YALE, *supra* note 1880, 58–59.

rights in lands belonging to the United States.[1894] The Constitution, however, provides no method or process for Congress's disposing of such property. Thus, in *United States v. Gratist*,[1895] the parties asked the United States Supreme Court to decide "[w]hether the President of the United States had power under the act of congress [sic] . . . to make . . . provision for the disposal of the public lands."[1896] Justice Thompson found that the term *territory*, as used in Article Four, section three of the Constitution, "is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power vested in Congress [is] without limitation . . . ."[1897]

The property at issue in *Gratist* was lead mines on United States land within the boundaries Illinois. The Supreme Court upheld the right of the United States to dispose of this property to the exclusion of any affect upon State of Illinois. "The disposal," said the Court, "must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of numerous tenantry within their borders, as has been so strenuously urged in the argument."[1898]

Congress's right of dominion over United States land is complete and discretionary. Thus, Congress alone determines what is needful or incidental to its exercise of its dominion and legislates accordingly. Congressional legislation concerning federal lands overrides conflicting state laws.[1899] Thus, the Supreme Court interprets the Constitution to forbid any of the several states from taxing federal lands within its borders.[1900] In fact, any state law that frustrates this plenary congressional power under the Constitution, or even embarrasses its exercise, is unconstitutional. Absent congressional action, however, states hold some jurisdiction over activities on federal lands within their respective borders.[1901]

[1894] *See* U.S. CONST. art. IV, § 3, cl. 2; United States v. Fitzgerald, 15 Pet. (40 U.S.) 407, 421 (1841); California v. Desert Water, Oil and Irrigation Company, 243 U.S. 415 (1917); Utah Power and Light Co. v. United States, 243 U.S. 389 (1917).

[1895] *See* 14 Pet. (38–39 U.S.) 644 (1840).

[1896] *Id.* at 647.

[1897] *Id.* at 647.

[1898] *Id.* at 648.

[1899] *See* Kleppe v. New Mexico, 426 U.S. 529 (1976).

[1900] *See* Van Brocklin v. Tennessee, 117 U.S. 151 (1886); Wilson v. Cook, 327 U.S. 474 (1946).

[1901] *See* California Coast'l Comm'n v. Ruck Co., 480 U.S. 572 (1987); Gibson v. Chanteau, 13 Wall. (80 U.S.) 92, 99 (1872); Irvine v. Marshall, 20 How. (61 U.S.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902); *cf.* THE UNITED STATES

The power of Congress over the disposal of federal lands has never eroded: it remains complete, allowing the prescribing of times, methods, conditions of transfer, and the power to declare the validity and effect of titles coming from the United States.[1902]

Description of the General Mining Law of 1872

The General Mining Law of 1872[1903] recognizes the right of any United States citizen, and any one intending to become a citizen, to enter federal lands, prospect, and explore for minerals.[1904] Once the prospector makes a discovery, stakes his claim, and shows that worthwhile amounts of minerals are there, the law allows him, at a modest filing fee, to obtain fee-simple title of his claim. Thus, the General Mining Law of 1872 is to the mineral-rich lands of the West, what the Homestead Act of 1862 was to the tillable lands of the Midwest. The Mining Law encourages prospecting and mining of hard rock and placer minerals such as gold, silver, platinum, uranium, lead, iron, and copper—provided the claimant swears by affidavit, each year, to have expended at least $100 worth of work on each claim for that year. Though this requirement remains in force, Congress has now modified it.[1905]

Congressional Intent

Congress, by holding forth the carrot of free access and surety of tenure of claims, encourages harvest of United States mineral lands. Congress thus fashioned the General Mining Law of 1872 to ratify the miners'

CONSTITUTION: ANALYSIS AND INTERPRETATION 889–92 (Johnny H. Killian & Leland E. Back eds., 1987).

[1902] *See generally* Gibson v. Chanteau, 13 Wall. (80 U.S.) 92, 99 (1872); Irvine v. Marshall, 20 How. (61 U.S.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902). See generally Field v. Seabury, 19 How., 60 U.S. 323, 332 (1857), for the effect of titles.

[1903] *See* 30 U.S.C. §§ 22–54 (1989).

[1904] *See id.*

[1905] *See U.S. Mining Law Amendments*, THE MINING JOURNAL, 14 Aug. 1992. On 5 October 1992, the President signed into law the Department of the Interior, Bureau of Land Management, Management of Lands and Resources Act of 1992, Pub. L. No. 102–381, 106 Stat. 1374. This act providing over $12,000,000 for mining-law administration programs by raising the yearly filing fee for mining claims from $5 dollars to $100 per claim. If a claim is under active exploration or actual mining, however, the usual $5 filing fee is all that is required under small miner's exemptions. Individuals claiming 10 or less claims qualify for the small miner's exemption.

customs and to build their confidence in mineral titles claimed, thereby further encouraging mineral prospecting, discovery, and mining:

> In the increasing agitation of the subject of the introduction into Congress of bills which miners regard as a system of confiscation, and which tend to destroy all confidence in mining titles, we now need statutes which shall continue the system of free mining . . . subject to legislation and open rules.[1906]

The General Mining Law of 1872 articulated law that the miners had practiced and proven in their mining districts' camps and courts. Its opening defines its reach: "All valuable mineral deposits in lands belonging to the United States . . . are hereby declared to be free and open to exploration and purchase . . . ."[1907] This avowal, viewed in the context of the previous discussion of history, shows that the General Mining Law offered nothing new, but rather, recognized and confirmed the well-settled, functional common-law tradition called the Miner's Law.

Judicial Interpretation

The courts have interpreted the General Mining Law of 1872 under an all-encompassing purpose: efficient development of mineral resources in the United States. For this reason, a claimant's title to mineral rights and mineral lands rests upon showing an economic presence of minerals and the intent to worry them from the earth. Without such intent, the claimant is without right to hold or occupy his claim.[1908]

A lawful mining claim on federal land is *property*, attaching all rights of property under the federal Constitution and the common law. The owner, therefore, is free to lease, sell, transfer, mortgage, or devise his claim; claims are also inheritable.[1909] Mineral title inures to the claimant through his discovery of valuable minerals.[1910] One will continue enjoyment of title of one's claim, however, only through diligent working of the claim with the intent to produce minerals.[1911] However, if the Department of the Interior, through its agency the Bureau of Land

[1906] Sparrow v. Strong, 70 U.S. (3 Wall.) 97.
[1907] 30 U.S.C. § 22 (1989).
[1908] *See* Bag v. New Jersey Loan Co., 88 Ariz. 182, 354 P.2d 40 (1960).
[1909] *See* Forbes v. Gracey, 94 U.S. 762, 24 L.Ed 313 (1877).
[1910] *See* 30 U.S.C. §§ 22–54 (1989).
[1911] *See* O'Reilly v. Campbell, 116 U.S. 418 (1886).

Management, determines that the minerals the prospector claims to have discovered as a basis for his mining location are of unmarketable grade, the Department will deem his claim of title to minerals void.[1912] In order to encourage mineral production, however, courts are to construe the Mining Law liberally in the miner's favor.[1913]

The mining process is often divided into five steps: prospecting, discovery, exploration, pilot production, and production.[1914] *Prospecting* is simply searching for minerals. *Discovery* is the direct hope of the prospector; once he has discovered mineral deposits, he will locate (stake) his claim of discovered deposits, thereby securing his tenure. With confidence of tenure, he will invest in *exploration*, small-scale or *pilot production*, and full-scale *production*. Further, "[t]he locators of all mining locations . . . on the public domain shall have exclusive right of possession and enjoyment of all the surface included within the lines of their location."[1915]

To locate a mining claim, the discoverer must mark out a surface site for future mining operations. Any citizen of the United States, any person having declared his intention to become a citizen,[1916] or any corporation chartered under the law of any state or territory of the United States has the right to locate mining claims on federal lands.[1917] Thus, an alien without intent to become a citizen can locate mining claims in fact, though not in law, through a corporate entity.[1918]

In order to keep title to his claim, the miner must expend at least $100 minimum in labor and improvement on his claim each year; no more is required.[1919] Miners often meet this requirement through the expense of exploration, such as drilling. To hold mining claims, however, for any sole purpose other than mineral production—such as rivalry or any possible discoveries that one only hopes to make—is unacceptable.[1920] In a word, the Mining Law requires that the miner provide evidence of his intent to produce minerals by making ongoing investments in his claim; if he does not, he will forfeit it altogether.

[1912] *See* Husman v. United States 616 F. Supp. 344 (D. Wyo. 1985).

[1913] *See* United States v. 9947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963).

[1914] Though these five divisions are common parlance among miners, neither these terms, nor their sequence, form part of the law's consistent expression.

[1915] 30 U.S.C. § 26 (1989).

[1916] *See* 30 U.S.C. § 24 (1989). O'Reilly v. Campbell, 116 U.S. 418 (1886).

[1917] *See* 30 U.S.C. § 24 (1989).

[1918] *See* Helit v. Gold Fields Mining Corp., 113 IBLA 299 (1990).

[1919] *See* 30 U.S.C. § 286 (1989); Mason v. Washington-Butte Min. Co., 214 F.2d 32 (9th Cir. 1914).

[1920] *See* New Mercur Mining Co v. South Mercur Mining Co., 128 P.2d 269 (Utah 1942).

If the miner proves the presence of economically viable reserves of minerals on his claim, he can take surface title in fee simple for a minimal fee of two dollars and fifty cents per acre for placer claims and five dollars an acre for lode claims. The law calls such allodial title to claims in fee simple *patented claims*.[1921]

III. Four Corner Stones of the Mining Law

The four corner stones of the Mining Law recognize the four parts of the process that accounts for its durability: access, self-initiation, diligence, and tenure. Uninhibited *access* into federal lands encourages *self-initiation*. Discovery being the source of title, *diligence* is the condition of *tenure* or continuance of title. Experience and history shows that Providence has bound these four fundamental components of the Mining Law in an interdependent design.

Access

The principle of unlimited access is necessary to the Mining Law because the discovery of valuable minerals is fortuitous: minerals are where prospectors find them, seldom where Congress hopes them to be. During the early days of the California Gold Rush, Senator Benton said that he wished "we didn't have these mines [in California]. But *there* they are."[1922] Simply put, wherever prospectors discover valuable minerals, only at that place will they mine them. This is especially true of hard metals and placer deposits, as opposed to hydrocarbons and fossil fuel minerals, such as coal and oil. Unlike metals, deposits of coal and oil defy discernable limits.[1923] Thus, by declaring all federal lands "free and open to exploration and purchase,"[1924] the language of the Mining Law still encourages unrestricted prospecting.

[1921] *See* 30 U.S.C. § 29 (1989); Lara v. Secretary of the Interior, 820 F.2d 1535 (9th Cir. 1987).

[1922] Sparrow v. Strong, 70 U.S. (3 Wall.) 97 (emphasis added). "Gold," prospectors are known to say, "is where you find it."

[1923] *See* Kenneth D. Hubbard, *Defending the 1872 Mining Law*, 5 NAT. RESOURCES AND ENVIRONMENT 37 (1990).

[1924] 30 U.S.C. § 22 (1989).

Self-initiation

The courts have found that the purpose behind the Mining Law is to encourage mineral production. In order to reach this goal, the Mining Law embodies the right to self-initiation:

> [A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs and districts, so far as the same are applicable and not inconsistent with the laws of the United States.[1925]

Self-initiation allows men to prospect at the convenience of their peculiar impulses. Discovery of mineral deposits never occurs at the command of, or in the times specified by, government agencies; rather, it is fortuitous, often occurring by accident. Recognition of this historical truth is the reason behind the principle of self-initiation. The impulse to prospect springs from within the prospector; some call it a fever. Restrictions upon times and places to prospect bar the harnessing of men's bold, yet unpredictable, impulses and thereby deny to all the wealth that such energy brings.

Diligence

Unlike most other enterprisers, "miners, as a community, devote three-fourths of their aggregate labor to exploration, and consequently ever will remain poor while the treasure of the world is augmented and replenished."[1926] In light of the necessity of such high-risk, up-front investment of the miner's capital and labor—throughout the world and in all ages—the Miner's Law rewards diligence with tenure.[1927]

[1925] 30 U.S.C. § 22 (1989).
[1926] Sparrow v. Strong, 70 U.S. (3 Wall.) 97, at 100.
[1927] *See* LACY, *supra* note 1856, at 21.

Tenure

Tenure removes the miner's fear of losing his claims, encouraging him to invest the labor and money required to harvest his mineral wealth.[1928] As long as the miner is diligent to bring his claim into production, the Mining Law gives to him the comfort of knowing he will keep title and possession as he pursues profit. To remove security of tenure will also remove motivation to continue prospecting, exploring, and developing mineral properties—to the detriment of all.

Pedis Possessio: Further Protection of the Prospector's Tenure

The common-law principle *pedis possessio*[1929] governs pre-discovery rights. *Pedis possessio* regards as licensees, and not trespassers, those peaceably stepping in good faith onto federal lands to go about prospecting for minerals. It recognizes that prospecting must precede discovery and that occupation of the land is necessary for ongoing exploration.[1930] *Union Oil Company v. Smith*[1931] provides the most cited definition of *pedis possessio*: a prospector proceeding on good faith "will be protected against violent, fraudulent and surreptitious intrusions so long as he [remains] . . . and diligently and in good faith prosecutes toward making a discovery."[1932]

Conclusion

The Miner's Law has never arisen by legislation, but has welled up in common practice. By confirming the miners' courts, their jurisdiction, and their articulation of the Miner's Law, the state courts have

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[1928] *See* Kenneth D. Hubbard, *Defending the 1872 Mining Law*, 5 NAT. RESOURCES AND ENVIRONMENT 172 (1990).

[1929] *Pedis possessio*, translates by the letter, "possession by foothold," meaning actual possession." BLACK'S LAW DICTIONARY 1019 (7th ed. 1999); BALLENTINE'S LAW DICTIONARY 917 (3rd ed. 1969). Courts have always held to a limited meaning of this term: they have not expanded a miner's rights beyond his foothold. Nevertheless, "the Tenth Circuit Court of Appeals has recognized circumstances in which *pedis possessio* may be extended to multiple mining claims." Continental Oil Co. v. Narona Service, Inc., 588 F.2d 792 (10th Cir. 1978). See generally M. Lee-Martinex, *Monopolization of Public Lands or Necessary Liberalization of Exploration Laws*, 20 NAT. RESOURCES J. 387 (1980), for a discussion of open access to public lands for purposes of mineral discovery.

[1930] *See id.*

[1931] *See* Union Oil Company v. Smith, 249 U.S. 337 (1919).

[1932] *Id. at* 348.

recognized and ratified the Miner's Law; the United States Supreme Court has joined in this confirmation—all in the spirit of the common-law tradition.[1933] The Miner's Law has arisen of itself throughout the world and over the centuries in amazing consistency. Attempts to modify the Miner's Law's fundamentals by legislation or decree have failed because to do so has altered or removed one of the four basic tenants of the Miner's Law, destroying incentive, and halting production of minerals. Without minerals from which to fashion the machines necessary to mine more minerals, neither individuals nor government will obtain the other raw materials—farm products (food) and lumber (building material for shelter)—needed to survive, operate, and prosper.

Widespread wealth depends upon the spontaneity of the prospector for discovery of minerals and the diligence of the miner for their production. For this reason, the tenants of the Miner's Law remain necessary to the wealth of a country and especially that of the United States. If legislation stifles the unpredictable impulses of the prospector, weakens the confidence of the miner in his mineral title, or if court decisions are in derogation of the fundamentals of the Miner's Law, when the impulse wells up in the prospector to prospect, he will hesitate to follow it. Lacking confidence in his tenure of mineral title, he will be unwilling to expend his labor and capital. At bottom, harvest of minerals will wane and benefit to all will ebb.

2
Constitutional Limits & Limits of the Constitution

Paper "rights" are worth, when threatened,
just what some lawyer makes them worth.[1934]

[1933] President Lincoln appointed Justice Fields to the United States Supreme Court because Fields had lived, practiced law, and sat on the Supreme Court in California during the Gold Rush and, thus, understood the California miners' natural and spontaneous expression of the Miner's Law.

[1934] Justice Jackson continues, "Civil liberties are those which some lawyer, respected by his neighbors, will stand up to defend." Robert H. Jackson, *The Lawyers: Justice Robert H. Jackson, in* THE PRACTICAL COGITATOR 454 (Charles P. Curtis Jr. & Ferris Greenslet eds., 1945). Men will defend that which they deem valuable; no man will die for that which he disbelieves. As did Christ, it is the duty of each person to insist upon his rights and those of others. *See John* 18:19—23. No one knows better when another has violated rights than the one trespassed upon. The fail to insist upon one's rights in property or to act is to give government free reign against others and to fail one's duty to God, who has entrusted it. In short, to neglect one's rights is to despise God.

Our Constitution sets limits for government, but being mere limits written on paper, the Constitution is limited in what it can do. Limits for government put in writing, at best, remind and motivate people to insist upon those limits. Common-law responds to truth best when the staying power of conviction drives the aggrieved. Thus, constitutional authority limits government power only as the aggrieved persists in his conviction to compel government to observe that authority. Our Constitution, considered in historic sequence with documents such as Magna Carta and the English Declaration of Rights, is an improved restatement of common-law first principles.[1935] The Constitution stands as a fresh expression of the common law's timeless truths and evidences our forefathers' attachment to common-law principles.

Truth never changes;[1936] therefore, consonant with Scripture, our common-law processes demand that we forever discover fresh ways to declare the truth of the law and apply it in new and unique circumstances.[1937] Upon this constant principle, the common law builds.

[1935] Expediency expressed as *necessity* is the government's worn argument for exceeding the limits of the Constitution. "Necessity," declared William Pitt, "is the plea of every infringement of human liberty." The argument of necessity plays to one's fears. Fear, however, is never the proper motivation for any action. The sum of all of the commands in Scripture do not exceed the sum of the admonition "fear nor" and "be not afraid." Fear results from faith in lies; personal peace results from faith in the truth. Fear, therefore, is evidence of a faith contrary to the faith that pleases God: i.e., faith in the truth. *See generally Habakkuk* 1–3; (providing an example of one man's experience as he moved from fear, confusion, and the verge of emotional breakdown to faith and joy in the God of his salvation). See generally *Habakkuk* 3:16–19, for a summary of Habakkuk's experience.

[1936] "The principle does not change, but the things subject to the principle [facts and circumstances] do change." MacPherson v. Buick Motor Co., 111 N.E. 1050 (1916). The unchanging principle (standard of law) finds new application.

[1937] The common-law tradition differs from the Roman civil law governing most of the world in that it maintains—as a practical matter—that law is not *made* because law, as a manifestation of the Creator's character, is eternal, as is He. Therefore, it is the duty of courts and legislatures to seek, discover, and discern the law's eternal truth, confirming it in well-articulated re-expression. This common-law first principle is ancient and remains an indispensable foundational doctrine. See generally §§ 5.1.1–5.1.2, 5.1.5, 4.2 of this book (discussing the source of the law and the common-law tradition's process of finding it).

In the unbroken tradition of the eternality of law, Lord Coke, in his *Reports* and *Institutes*, expands on his predecessor Littleton by re-stating the common-law first principles from medieval times and adapting them to the needs of his country. For this same reason, Blackstone said that the common law's present application to new circumstances is *oracular* (from the old French *oracle*, meaning "a divine pronouncement," as delivered through the mouth of a mere man). Finally, this is why a threshold task of our courts, when presented with a case, is to search out and discover the unchanging principle of law that will serve as the presupposition for their analysis. By contrast, in Roman civil-law systems, the language of the Code is the command of the state's will, and is therefore, the presupposition to be accepted without question in analyzing legal disputes. Even if never expressly stated, the underlying presumption of the civil law is that the Code is the product of perfected reason.

"A new judgment," says Justice Coke, "does not make a new right, but declares the old; because adjudication is the uttering of a right, and through adjudication the right that has long been hidden is revealed anew."[1938] Men desperate to gain advantage often suppress the facts from view and twist the law, keeping it from right application to the case at hand. The law, nevertheless, has always *been*. Thus, the common-law never seeks the fountain of law in the mind of mortal man; where it does, it abandons its foundation and ceases to be the common law.

Our Constitution is an informed document in that it presupposes an understanding of the common-law processes of the courts and government (due process), and the common-law mindset: pursuit of individual responsibility and independent judgment, neither addressing every contingency, nor always explicit respecting those matters it does address. Rather, the common-law tradition leaves the individual to his creative powers to apply law to his life and actions before intervention of courts or government.

Under the many features and protections of the common law, we are freed to look for truth, wherever our search leads. Our Constitution puts to parchment common-law principles, which have meaning only within the context of the common law's history. The Constitution intends the common law's rare methods of establishing precise limits upon government: prohibiting government from favoring one party over another or favoring the government over the individual, while nonetheless insuring freedom of the individual to engage in fair competition, whether in the arena of ideas, business, or the courtroom.

The common-law tradition, as enshrined in our Constitution, restricts government so that we are free to follow the lawful dictates of conscience; we will be free to the corresponding degree of that limitation. In short, a people's freedom is in direct and inverse proportion to the reach of government power. Nevertheless, even in these noble purposes, our Constitution, standing alone, remains a mere paper barrier. In order to protect freedom, the principles of the common-law must become the mental habit of a critical mass of Americans, as it was before, during, and for decades after, the forefathers founded the United States.

In marked distinction to the humanistic theory of Roman civil law, law is eternal truth awaiting discernment, declaration, and application; law is not the creation of the human mind. *See* FORTESCUE, *supra* note 59, at 129, 137.

[1938] *Novum judicium non dat novum jus, sed declaret atiquum; quia judicium est juris dictum, et per judicium jus est noviter revelatum qoud diu fuit velatum.*

Conscientious Americans will strive for familiarity with the fundamentals of the common law as espoused by common lawyers and the courts. Until recent decades, America possessed a critical mass of men and women with minds habituated to the first principles of the common law, as contrasted with Roman civil law.[1939] Integral to such habit was a national familiarity with God's Word that enlivened our understanding of law and government and provided historical context that gave correct meaning to the particulars of the Constitution.

By its excellence, common-law government is superior to the world's republics and *democracies*, past and present—from the polity of the democratic Greek city-states to the urban law of Rome's empire, from revolutionary republican France to the Republic of China—, all of which have operated by civil-law principles, allowing one faction to oppress another. In order for the individual American to experience liberty in this life, the common law's peculiar fundamentals must persist in the American conscience; otherwise, our Constitution will be no more than an occasional irritation to the lawless aggression of those in government.[1940] To ignore our common law, is to weaken law and government and become an easy mark for the cancer of civil-law notions of absolutism that have encroached under labels such as communism, socialism, fascism, and—our present danger—bureaucratic legal

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[1939] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *320–21. Blackstone distinguishes between authority inherent in true *law* and the raw power of the *state* by demonstrating that the civil law's engines of torture, such as the rack, coupled with the inquisitorial method are not a manifestation of true law but of state power. Blackstone makes a persistent point of distinguishing common law from civil law, insisting on the superiority of the common law. For this distinction, modern critics have accused Blackstone of unjustifiable bias toward his native tradition. It is worth noting, however, that William Blackstone was one of those rare common lawyers trained in the Roman civil law before entering Middle Temple and receiving a call to the English Bar in 1746. Of all men, Blackstone understood the difference between the two traditions and made his choice according to his well-informed convictions. *See generally* 12 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 719–49 (1925) (affirming Blackstone's academic interests in common law):

> Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. But . . . we must not prefer the edict of the praetor, or the . . . the Roman emperor, to our own customs . . . unless we also prefer the despotic monarchy of Rome and Byzantium . . . If an Englishman must be ignorant of either of the one or the other, he had better be a stranger to the Roman than the English institutions.

1 BLACKSTONE, *supra* note 12, at 5.

[1940] George Washington, our first President, exhorted us that government is neither eloquence nor reason, but force, "Like fire, it is a dangerous servant and a fearful master."

positivism, namely, administrative law.[1941] The truth of the law is always available, but even where enacted into law, truth avails nothing unless the individual declares, insists upon, and is willing to fight for its observance.

I Learn Passion is Blind to Barriers

While growing up, I tended daily, and became familiar with, cattle and hogs, horses, goats, and chickens. My grandfather and father let, handled, and hauled bulls; from this I learned the dangers of cattle. I also learned to respect the kick of the horse colt, the butt of the billy, and the spur of the rooster. For raw aggression, however, few domestic animals match an old sow on the scrap to defend her piglets. Lead her to believe that one of her litter is in danger and she transforms from a contented rooter into an "instant, white-hot and wild, wakened female warring as for . . . [her] child."[1942] Contrary to appearances, sows are mobile and agile,[1943] especially when incited to be hostile.

Our sows farrowed on the sand hills north of the house. Hogs are born to root their way through life: their nature demands it; their life depends on it. As goes the saying, "Root hog, or die," so goes the life of a hog. Dad said that if a pig ever rooted his nose through a hole under the fence, he will get his whole body through and out of the hog lot. He was right. Our pigs were forever *out*. Stockmen build fences horse-high and bull-strong, but a pig-tight fence is stockmen's cant.

Early each morning, with the help of our shep dogs Ol' Lade and Frisk, I ran the pigs down, one by one, and put them back in the lot. Some of these pigs pushed fifty pounds: big enough to outrun a man, but in spite of their size, still un-weaned. Without our dogs' help, I could never catch them. As I gave chase, the dogs frustrated their flight, allowing me to close in. Once close enough, I dived for the pig's hind legs. After catching his legs, I gently swung the pig up over the gate and into the pen in such a way as to let the rascal down gently, turning loose his legs. After getting all the pigs back *in*, I plugged the holes under the fence by tying old rails and stray timbers along the fence's bottom, using

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[1941] See generally § 6.3 of this book (discussing the sources, features, and blights of administrative law).

[1942] *The Female of the Species*, *in* RUDYARD KIPLING, GUNGA DIN AND OTHER FAVORITE POEMS 66–67 (1990).

[1943] When excited, and over short distances, a full-grown hog can attain speeds of up to thirty miles an hour or more.

strands of bailing wire that we had expended feeding the cattle during the winter and hung handy on the fences and fence posts for such purposes.

One morning in early August I rolled out of bed, pulled on my overalls with no shirt, and slipped on a pair of flip-flop sandals. The day was among the hottest and most humid dog days of summer: about 100 degrees and 100 percent humidity at sunup. I left the house for the sow pens out north on the sand hills, figuring to get all the pigs back in and back to the house in thirty minutes, when breakfast was ready.

The dogs and I went to work. I soon caught a pig, grabbing his hind legs just as he rounded the outside of a fence corner. In his desperation to shake the dogs loose from hanging on his ears while making the turn, his legs tangled just long enough for me to gain the advantage. Diving for his hind legs at the opportune moment, I caught hold and held fast as the centrifugal force of rounding the outside of the fence corner rolled us both into the horseweeds. Holding with both hands onto the hog's hind legs, while his front legs were still on the ground, enabled me to guide him like a wheelbarrow, but with one difference: unlike the handles of a wheelbarrow, the pig's legs agitated unending—jackhammer-like.

In addition, the pig was screaming up a storm. As I moved him into position in order to swing him around and in an upward motion to clear the four-foot gate, I glanced into the lot and saw an agitated sow. Pushing 400 pounds, she stood sideways with her head turned toward me. Violent snorts erupted from deep within her innards. With each snort came a bouncing upheaval of her whole body, from her engorged udders up to her high back. By my glance, I took quick account of all factors relevant and calculated that she was set to rescue her pig. Being a Yorkshire (white-colored breed), the normal redness of her engorged udders had turned abnormally white. Dad had told me—and narrow escapes had taught me—that just before a nursing sow attacks, her muscles prepare for the demands of battle by pulling the blood from her udder, causing it to go pale. The pig's screaming had put his mother on the scrap. I, nonetheless, remained unalarmed because a four-foot-high steel gate stood between her and me. Without fear, and leaning back on both heels in order to balance my weight against the rotation of the pig's weight, I made ready to swing him up and over the gate.

By this time, his mother was making a beeline for me at full tilt; her mouth was wide open and I saw down her throat as she closed the distance. Having, however, seen all of this before, I stayed unconcerned; the steel gate that stood between her and me was made of the best steel and sturdiest gate building material available in that part of the country:

three-eights inch oil-well sucker rods. Moreover, to bolster my confidence in its strength, I had designed and welded the gate together myself. Possessed with cocksure satisfaction borne of the self-confidence of experience, I envisioned the old girl crashing into that gate—as I had seen untold times before—, while I watched in calm safety within only a few feet of her fierce resolve to rip me open. I had just begun to swing the pig up when, to my horror, two jumps from the gate, the old gal went airborne; straightaway, that sow's agility brought low my confidence in my gate: no more than a dreamer's wall of imagination.

Of a sudden, she was at my shoulder height; the force of speed, weight, momentum, and gravity were in her favor; all that stood between us was two cubic feet of hot, humid air. At that eerie moment, her and I both knew she had the drop on me. With no time to dodge, much less run, in desperate haste driven by instinct, not intelligent choice, I took the only evasive action time allowed: pitching the pig loose, I fell backward and tumbled away. Clearing the gate like a gazelle, the sow's front toes touched down with the force of 400 pork pounds of blind aggression, her open jaws slamming into her pig broadside at his rib cage, now a sacrifice successfully offered for my life. She chomped down on him a couple of times before gaining her senses and turning him loose, her misguided attack leaving only a few punctures in his tough hide. Sprawling backwards, I had kept tumbling, trying to salvage my hide. By the time I had unscrambled my legs, gathered them under me, and looked back at the sow, her burst of force now expended, she stood alert with her head up, as though surveying the effect of her charge—grunting and munching on one of my flip-flop sandals that hung from her mouth. In my haste to get clear, one foot had left behind a sandal.

I had fashioned that gate with care and relied on the skill of my mind and hands to no avail. My gate kept the sow in only until her passions took hold; that which experience had convinced me will never happen, did happened.

The passions of men in government, coupled with natural ambition, ever impel them to transgress constitutional limits for government. The Founders hammered out, forged, and fashioned the Constitution with great care and according to their convictions and those of their fellow Americans. It is likely the finest summation of the principles of common-law government ever penned. Nevertheless, without one's present and individual understanding of its unwritten common-law foundations supported by one's conviction, the Constitution remains a mere fence of parchment waiting to be punched through or jumped over. As my gate,

which I framed and fashioned with intent to keep unruly sows in, so also the Constitution is by the people and framed with intent to keep lawless government penned in.

To trust the Constitution in place of the eternal God—somewhat as I trusted my gate—is legalism. Man is a wholly dependent creature: all that he has or hopes to have and enjoy, he must derive from the God that made him. If, therefore, one yearns for right government, one must trust God to create the loyalty and instill the steadfastness to claim the principles of the Constitution necessary for keeping government within the boundaries it sets. Our national motto is not, "We trust in the Constitution," but instead, *In God we trust*.

Moreover, we are never to trust those administering our government to confine their activities within constitutional bounds; they neither have done so nor will do so with consistency. Rather, each person is to keep the common-law principles of the Constitution well tended in his mind, while trusting God to subdue his passions and frustrate the misguided passions of others. The passions of men are akin to those of my old sow: seeking its own goal, passion remains blind to all else, including the rights of God and of others. As a strong gate four-foot steel gate failed to restrain the passions of the sow and as a locked door will fail to restrain the man enslaved to his dishonest character, the Constitution will restrain only the person whose lusts have not enslaved him.[1944] Neither reason nor education alone, nor both together, will detour those whose misguided passions drive their ambition.[1945]

Once the natural impulses of the sow overwhelmed her, no method of keeping her from jumping my gate remained. Only having changed her nature before hand could have stopped her—, which was no more possible than removing her impulse to root and wallow. Blinded by her passions at the height of her aggression, she was even unable to distinguish me from the pig she tried to protect. Likewise, once the natural impulses of the officer or magistrate of government overwhelm him, no method of keeping him from leaping over our Constitution

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[1944] See generally app. 24 of this book, for a vivid example of judges' passions overcoming established safeguards of due process in the arrest and inquisition of Christ.

[1945] Education alone will not reform a sinner, but will only further sophisticate his sin. Dwight L. Moody once said that once a common thief accustomed to stealing bolts from railroad tracks receives a university education, he will cease stealing bolts and attempt to steal the entire railroad. *See Jeremiah* 17:9; *Romans* 3:10–18. Without Scripture illuminated to one's mind by the Holy Spirit, education merely sophisticates sin; only through the Word of God will the Holy Spirit transform the heart and mind, removing one's craving to sin.

remains, save the intervention of God by either changing his nature or by frustrating his passions. God, in His providence, is able to do both.

In order to restrain those in government from violating constitutional limits, the common law presupposes a critical mass of individuals disciplined and habituated to the fundamental methods of the common-law tradition.[1946] Scripture also attributes this responsibility to each individual. Preservation of our freedoms demands a progressively finer understanding of truth and habits in keeping with that understanding. These abilities demand the new birth and the resulting transformation of the mind that motivates a man or woman to respect the substance of Christianity and to act in preservation of the common-law forms of procedure and due process.[1947] Once transformation of the mind gives orthodoxy (right doctrine), *ortho-praxy* (right practice) will follow. The sincere investigator will discover the common law's accord with Scripture.[1948]

In his day, Congressman Fisher Ames lamented, "Of our six millions of people there are scarcely six hundred who yet look for liberty anywhere except on paper."[1949] Preservation of the common-law tradition

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[1946] See generally §§ 1.7, 4.5 of this book (comparing common-law fundamentals with those of civil law).

[1947] B.B. Warfield said that the non-observance of proper forms of godliness will not destroy the substance of Christianity, but will impede delivery of the Spirit's power. Warfield cites Rudyard Kipling's "barrack-room ballad," entitled *The 'Eathen*, to demonstrate that where one ignores order, one sacrifices divine power; adhering to God's order demands an understanding of His authority structure. Because divine power flows from divine authority, observance of divine authority enables divine power. The potential of the Spirit to exert His power is in proportion to the degree that one maintains God's order of authority. *See* 2 BENJAMIN B. WARFIELD, SELECTED SHORTER WRITINGS 729–34 (John E. Meeter ed., 2001).

Scripture also teaches that men forfeit God's power by using proper forms of godliness, while denying the Spirit's power. See generally 2 *Timothy* 3:5. See generally app. 3 of this book, for an exposition of the two Hebrew terms: שלום (*shalom*: the Hebrew term for properly ordering one's life) and משפט (*mishphat*: the Hebrew term for properly ordering one's government). *See generally* WINTERS, *supra* note 39, at app. V (observing that the power of an internal-combustion engine is dependent upon the ordered timing of the movement of each engine component; if one movement is out of sync, power is sacrificed or lost altogether). In God's government, the end does not justify the means or *method*. Because He is the source of order, God holds the orderliness of His processes in dignity equal to the substance of His standards. God intends His people to maintain His order amidst this world's disorder: holding fast to God's methods in the battle's confusion.

[1948] See generally § 4.1–4.1.2 of this book (discussing the effect of Scripture in the common-law tradition). See also generally § 4.10, for the common-law tradition's accord with Scripture.

[1949] 2 FISHER AMES, *The Nature and Basis of Bonaparte's Power*, *in* WORKS OF FISHER AMES WITH A SELECTION FROM HIS SPEECHES AND CORRESPONDENCE 223 (Seth Ames ed., Little & Brown 1854).

depends upon Americans that look for liberty other than on paper: i.e., in individual cases and in the courts according to common-law due process, trusting God that following the process will uncover truth. Such is our foiling of the encroachments of utopian humanism of the Roman civil law[1950] that enable communism, fascism, and bureaucratic legal positivism[1951]—all different labels of the same basic scheme, allowing the few to exploit the many.

Possessing the mind of Christ brings the experience of liberty; if one places one's trust in the Author of liberty, God's Spirit will indwell and compel that one to respect the common-law substance of government by observing the common-law forms: thus far, God's method of protecting our liberties, while nurturing an independent spirit. The common law has proved to be the guardian at once of our private rights and public liberties.[1952] Constitutional law without the common-law tradition, however, is the Constitution drained of its blood and a wishbone for its backbone.

[1950] Roman civil law governs the nations occupying almost the entire land area of the planet. Proponents of civil law claim that the civil-law tradition is superior to the common-law tradition because it is the perfection of human reason. At Bologna, Rome organized the Europe's first university. Centered on Roman civil law as the unifying standard of all disciplines of study, Rome expanded her system of universities by duplicating and reduplicating the university at Bologna and controlled the system's uniformity by requiring that university lectures be only in Latin. By requiring Latin as the exclusive language of academics, law, and ceremony, Rome reinforced her intellectualism over true law and government of church and state, which, in turn, insured Rome's despotic power over men's consciences and actions, from princes to paupers.

The record of history is incontrovertible: since Babylon's founding, the civil-law tradition has fawned over the self-proclaimed intellectuals of this world. Since the days of the Renaissance, these advocates of pure (abstract) reason have taken the title *humanists*: teaching that the mind of man is the measure of all things. They have further argued that Justinian's Code produced Rome's great empire; therefore, the Code is the worthy measure of not only all other traditions of law, but also of all else. Roman civil law presupposes that the professional jurist must extrapolate good law from the minds of those ordained to command by legislative will ordained. By contrast, common law presupposes that true law and its particular applications have always existed in the omniscient mind of God, which men are responsible to seek and discover. *See Matthew* 7:7–8.

[1951] In general, the theory of legal positivism refuses to recognize anything as law until a government with strength enough to enforce its will, declares its will to be law. Therefore, positivism holds that might makes right (law). *See* LON L. FULLER, ANATOMY OF THE LAW 177–78 (1968). Legal positivism is the fundamental theory supporting Roman civil law: law is the will of the state expressed in its legislation.

[1952] Thus stated Joseph Story, United States Supreme Court Justice from 1826 to 1844. Man is to seek first—before anything else in life, i.e., the younger, the better—God's sovereign ministration of government (form of government) and the outworking of God's, not man's, righteousness (substance). In pursuance of these, men are to pray, "Your kingdom [God's sovereign ministration of government] come, your will [God's righteousness] be done . . . ." See generally app. 15 of this book (discussing the biblical concept of *kingdom* as jurisdiction).

The Constitution: An Aspiration to Common-Law Principles

As though many choices concerning behavior are amoral—without moral significance, and thus, never to be judged by any standard of morality—, some label only certain questions *moral*.[1953] All choices of human behavior, however, are moral choices. Unless a critical mass of persons grasps and implements the controlling principles of common law and government, violation of the well-known issues labeled "moral" will continue to plague—despite deep moral outrage and futile flurries of political resistance and legislation. Those calling themselves the political right focus on those issues they have singled out and labeled *moral*, largely ignoring all other questions; those calling themselves the political left focus their passions on vindication of those issues they call civil rights and attempt to separate all questions of law from morality. God's Word, however, is clear: amoral questions are nonexistent; morality is inseparable from questions of law.

The Constitution is among the briefest and clearest human expressions of the controlling principles of common law and government available. To grasp aright and enjoy the principles of the Constitution, however, one must know the reason for them: how Providence has drawn these from the forge and shaped them on the anvil of history. For example, the right to trial by jury, due process, freedom of speech, to remain silent, the doctrine of true separation of powers, the limits of federal jurisdiction *vis à vis* state jurisdiction, the limits of federal police power, etc., are all common-law principles included in the Constitution and defined in the history of the common-law tradition.[1954]

Friction and competition between the common-law and the civil-law traditions in Church history, and more direct, the history of the Church in Britain, culminating in the Reformation, purified these rights and teachings for our enjoyment.

[1953] Long-standing indiscriminate use of the terms *mores, moral*, and *morality* have made them hackneyed. As are the terms law, ethics, virtue, manners, customs, right, wrong, good, and bad, the terms *mores, moral*, and *morality*, are incapable of meaningful use if estranged from the God of creation and His Word. To deem certain questions of human conduct moral and others amoral, or to deem all questions of human conduct amoral, is without justification in light of creation or God's Word written.

[1954] See generally §§ 3.10.5, 5.3.4 of this book and accompanying notes, for the Supreme Court's recognition that the Constitution expresses the language and principles of the common law.

3
A Biblical View of Law & Government: Key Terms

Sound thinking is to think God's thoughts after Him. It is to understand as God understands, both the age to come, with its government and judgment, and this present age of government and judgment. This present age is the time of man's judgment and is to be distinguished from the time of God's judgment, which is to come. Man without Christ is spiritually dead and left entirely in his natural and flawed condition, sometimes called *fallen*. In this state and this age of the judgment of man, man's judgment is necessarily flawed.[1955] The question then arises for the Christian, "How am I to respond and function in this 'day of man's judgment'?" How is one to be *in* the world, but not a product of the world?[1956] A first step in attempting to answer this question is to learn the Bible's distinction between this present *day of man* and the coming *DAY of the LORD*.[1957]

Peter the apostle reveals three distinct *worlds*, or ages of human life, the first two of which God entrusts to men the authority of courts and judgment: the "world that then was,"[1958] before the flood of Noah; the "heavens and the earth which now are";[1959] and the "new heavens and new earth,"[1960] which are to come. The first two of these refers to a religious, political, and economic *order* that has fallen man at the helm and is distinct from God. The third is God's reign on earth in the person of Christ; His right to govern rests upon His worthiness. The second is this present day of man's administration of law and government.

In the present day, the Christian is to seek and implement the principles of God's *Kingdom*—i.e., His *βασιλεια* (*basileia*): authority in the sense of jurisdiction to act. The principles of God's Kingdom comprise God's forms of government fulfilled with His substance of government. The forms of God's government are His methods and

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[1955] The common law's demand for due process is the common law's recognition of man's inborn flaws and bias in the administration of justice.

[1956] *See John* 17:9–18.

[1957] See generally app. 31 of this book (distinguishing between the adversarial common-law tradition and the inquisitorial civil-law tradition by comparing the biblical concepts *the day of man* with *the DAY of the LORD*).

[1958] 2 *Peter* 3:5–6.

[1959] 2 *Peter* 3:7.

[1960] 2 *Peter* 3:13.

processes of governance; the substance of God's government is His righteousness, never ours. To implement God's government demands thinking God's thoughts after Him[1961] and gaining the mind of Christ, a process demanding daily renewal by God's Word.

God longs that His view of law and government be ours. The writer suggests that in order to pursue the right worldview of law and government, at least six biblical terms deserve rapt examination: two Greek terms from the New Testament and four Hebrew terms from the Old Testament.

This Cosmos:
The Age of Man's Administration of Law and Government

In Scripture, *cosmos*[1962] signifies this present physical life and all that pertains to temporal matters. The English term *world*, often used to translate the New Testament Greek term *cosmos*, conjoins two ancient Teutonic roots: *wer* (man) and *ald* (age), resulting in "the age of mankind" or, to expand, "the day of man's habitation on earth." The "world" is that out of which God saves His people: this present age of government administered by men and all that pertains to it. The scriptural worldview of this age of man's administration of law and government demands that one understands this present world, bound in time and space, from the perspective of the One unbound by time and space, the "wholly other" Creator God. His kingdom (authority) is never a product of[1963] this present age or world, but nonetheless, is to be applied in the here and now. We are, therefore, to pray that His "will [standards of law] be done" in this world and during this present age, which will only occur through observing the forms of administration of justice consonant with His written Word.

God's view of the world is the only right view because He is the Creator; He alone, therefore, knows the entire meaning and purpose of His creation. To see and understand the world as God sees it is the gist of

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[1961] *See generally* CORNELIUS VAN TIL, CHRISTIAN APOLOGETICS 47, 59, 68 (1976) (concluding that to think God's thoughts after Him is to engage in the true scientific method; it is to gain the right view of God's created order: viz., worldview). The faith that pleases God is that trust placed in God's words as He has defined them. For one trust God's Word as He intends one to understand it is to trust God.

[1962] Greek *κοσμος* (*cosmos*).

[1963] *See John* 18:36. "My right to govern [*'η βασιλεια 'η εμη* (*hay basileia hay emay*): emphatic possessive, "*my jurisdiction*]," says Jesus, "is not out of [*ουκ εστιν εκ* (*ouk estin ek*)] this present world [*του κοσμου τουτου* (*tou cosmou toutou*), ablative of source].

true life. To abide in the record of God's thoughts—that is, in His Word—is to experience a lively and continuous ordering and renewing of the mind. For example, the scientific method that has advanced the richness of life in this present world, said Cornelius Van Til, is simply thinking God's thoughts after Him. Because God's thoughts are harmonious with His creation, thinking the Creator's thoughts brings one's mind into tune with the spiritual realm as well as His created physical order. Thus, the scientific investigator, who understands God's reasons and purposes for His creation, is motivated to observe and study the physical laws of nature (physics) in order to harness its power for good.

Scripture declares that God is never the source of disorder,[1964] but of order.[1965] The Greeks discovered in nature the rules that enable the

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[1964] The Greek term *χαος* (*chaos*) is not in the New Testament. In describing the disorder uncharacteristic of God, Paul the apostle uses the more-descriptive synonym *ακαταστασια* (*akatastasia*). The alpha privative (*α–*) negates *καταστασια*: that which is *un*-settled because possessed by restless spirits. See also, *e.g.*, *James* 1:8, where translators rightly render *akatastasia* "unstable." By its definable parts, *a-kata-stasia* means "without understanding" as well as "not according to standing"; both meanings are in keeping with the term's usages. *Akatastasia*, therefore, is more precise to Paul's and James's purposes than is *χαος* (*chaos*): both writers sought to persuade their readers to conduct themselves with understanding and according to the standing God had granted to them as Christians.

[1965] Greek *κοσμος* (*cosmos*). The English word "cosmetic" stems from the Greek *cosmos*. For example, landscaping a rundown, neglected home that is overgrown with brush brings a *cosmetic* effect to its appearance because that which has been out of good order is now in proper order. Things arranged in correct order are set in proportion, balanced, complimentary, and consequently, are pleasing to the eye. The ancient Greek described such an appearance with the term *cosmos*. The polluting effect of the fallen human race has now estranged God's creation or *cosmos* from God.

In addition to *cosmos*, two other New Testament Greek synonyms with cosmos are also translated "world": *αιων* (*ai-own*) and *οικουμενη* (*oikoumenay*). Cosmos denotes God's creation as estranged from God due to the polluting effect of the fallen human race. *See Romans* 8:22. *Aiown* always signifies, in some way, the passing of time and is comparable to the Latin *seculum* (English "secular" as in "temporary"): i.e., passing of the time of life and things temporal. *Oikoumenay* is the present participle of *οικεω* (*oikew*), meaning, "to inhabit" and hence, denotes mankind's temporary habitation of earth, i.e., the inhabited world.

Greco-Roman culture used *oikoumenay* to denote that portion of the earth that its urban civil-law and government controlled: the civilized (civilian) world.[1965] To the Greeks and later the also Romans, the terms *civilization, civilized*, and *civilize* meant subjection to naked logic, loyalty to the Greek city-state and later to the city of Rome, expressed by subservience to law of Rome: "lit. etym. sense, 'to make citified.'" WEBSTER'S NEW WORLD DICTIONARY 261 (2d ed. 1976). *See Luke* 21:26: "Men will expire from fear, even from the expectation of the things coming in the *oikoumenay* [the Greco-Romans' *civilization*: i.e, the Babylonian tradition and her progeny]." The expectation that will cause men's breath—*αποψυχοντων* (*apo-pseeuchantov*): the departing breath of physical life—to expire from them, is a *convening* or coming (*επερχομενων: eperchamenon*) of events in Babylon's statist system of religion, law, government, and economics. During the first century, when Luke wrote these words in his Gospel, man knew this statist system by the word *Rome*.

appearance of *cosmos*. For example, their understanding of the proportions and balance that are pleasing to the eye is apparent in their pervasive use of the golden rectangle[1966] in their architecture and statuary. Going further, to the Greek, *cosmos* meant that which is pleasing to the senses in outward appearance because its internal order is according to right mathematic proportion and arrangement. The Greeks believed that proper order within, and among, the components of a thing always produce a display of proper order in outward appearance, making it pleasing to the eye. To express this belief, they coined the term *kalagathos*,[1967] which conjoins *kalos*[1968] (signifying beauty in outward appearance) and *agathos*[1969] (signifying inward ordered health and fertility). To the ancient Greek, an apple displayed the beauty of outward proportion only because the apple tree and the soil from which it grew had inward order and health. In short, fruit having outward beauty (*kalos*) grows only from a tree having inward good (*agathos*).

The one born of God, says Scripture, has overcome[1970] this present world (*cosmos*); further, Paul commands God's people to never be

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Luke's Gospel, the reader will recall, targets the *civilian* world—the academic tradition of the Greeks and Romans later called humanism and scholasticism.

The *cosmos*, however, denotes God's created order now fouled by the chaotic eruptions of Satan and his minions. Matthew's Gospel uses *cosmos* nine times, Mark's and Luke's Gospel each use it three times, but John's Gospel uses it seventy nine times, "of which forty-one usages (not to mention the pronouns substituted for it) were spoken on the evening of the last supper, in His experiences with the disciples in the Upper Room, and in the Garden of Gethsemane. Beyond any question, the term [*cosmos*] is chosen by Christ to represent the sphere of Satan's activities in this earth." DONALD GREY BARNHOUSE, THE INVISIBLE WAR 233–34 (1965).

[1966] The proportions of the golden rectangle, regardless of size, are always the same: the lengths of the sides are in the golden ratio, approximately 1:1.618 (ϕ). Much of the visual beauty of nature is attributed to the golden ratio; men use it with ascetic effect:

> [In the golden rectangle] is contained the ground-principle of all formative striving for beauty and completeness in the realms of both nature and art, and which permeates, as a paramount spiritual ideal, all structures, forms and proportions, whether cosmic or individual, organic or inorganic, acoustic or optical; which finds its fullest realization, however, in the human form.

ADOLF ZEISING, NEUE LEHRE VAN DEN PROPORTIONEN DES MESCHLISCHEN KÖRPERS *Preface* (Leipzig 1854).

[1967] Greek καλαγαθος (*kalagathos*). The New Testament does not use *Kalagathos*.

[1968] Greek καλος (*kalos*).

[1969] Greek αγαθος (*agathos*).

[1970] Though the translations sometimes vary, both of these verses use the same Greek root. The verb form used in *John* 16:33, νενικηκα (*nenikayka*, Greek perfect, from νικαω: *nikow*), means "to overcome" or to be victorious; the noun form used in *Romans* 8:37, ὑπερνικωμεν (*hupernikomen*), means "more than an overcomer" or victor. Emperor

conformed to this age (this world), but to the contrary, be transformed by the renewing of the mind.[1971] Indeed, ours is never to reform this present world order any more than it has been our job to reform the communist systems in China, North Korea, or Cuba. Rather, ours is to replace this present world order with that which is best. Likewise, Jesus came not to reform men or make bad men good; rather, He came to make dead men live, one at a time—to replace death with life. "Ours is not to capture the spirit of the times," said G. Campbell Morgan, "but to change it": to replace it with that which is best, i.e., the things of the Spirit of God. Darkness will not be shooed away; only light causes it to flee. Likewise, perfected love throws fear clean out.

In good faith, the early reformers tried to resurrect from the dead the Roman system religion, law, and government. In time, however, they understood that new wine (substance) required new wineskins (forms and processes). The new wine was the neglected and forgotten Word of God, nevertheless new to the reformers; the new wineskins were the forms and processes of the common law. In England, the principles of the Scriptures were poured into the forms of the common law, which, like new wineskins, offers a never-ending ability to expand, as applications of God's Word multiples.

The civil law, the world's popular system of law and government, will fall of its own defects in the face of persistent practice of God's ways of law and government. Only through the renewing of the mind by learning the record of God's thoughts in His Word written and through the light of nature will right ways of thinking replace wrong ways of thinking.

The correct view of God's created order—the true life-and-world view—is systematic, in that all of its component parts and assertions are harmonious between, and among, themselves. To discover and discern God's intended order of things is to learn, first, that God intends not a cacophony of confusion (disorder), but a symphony of harmony (order). In short, law coming from God is harmonious with God, with itself (God's

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Claudius uses this root in a letter to a gymnastic society, thanking them for a golden crown sent to him on the occasion of his victorious campaign in Britain in A.D. 43: *επι τη κατα Βρεταννων νεικη* (by the letter, *upon the occasion of the Britain victory*: i.e., the victory over the Britains). In *Romans* 3:4 and in the papyri, the root is used in the sense of winning one's legal case. In both of these cases, showing the truth brings victory before the judges. In *Romans* 3:4, the defendant's victory comes by agreeing with the Word of God; in the papyri example from the mid third century B.C., victory comes by showing the *false witness*: *ψευδομαρ[τ]υριον* (*pseudomarturion*). JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 427 (1930).

[1971] *See Romans* 12:2.

Word),[1972] and with God's creation (nature). The correct worldview of law and government demands that the standards of law and the processes of government be consonant with God's revelation written in His Word and revealed by His world;[1973] that which is consonant with God's revelation in all its parts will also be harmonious and in sync within its self. Such order sacrifices no power.

Yada:
Biblical Knowledge –vs– Humanist Knowledge

The Hebrew term *yada*[1974] signifies the experiential knowledge of an intimate relationship: knowledge produced by familiar life-giving communication. *Yada* signifies a personal response of the intellect and behavior motivated by a person's entire being: mind, will, and emotions. Thus, *yada* is an intimate knowledge from active experience with another that produces rational conclusions and action. It is, for example, the knowledge that Adam had toward God before his fall in the Garden of Eden, the intimate knowledge that Adam had of Eve that resulted in her conception,[1975] and the knowledge spoken of in Daniel: "The people who are knowing [*yada*[1976]] their God prevail and effectively act."

Such special knowledge between God and man was broken in the Garden of Eden, where Adam sought knowledge independent of God rather than deriving it as a personal and intimate gift from God. Adam sought autonomy: the exclusion of God's revelation as the reference point of beginning in his search for truth and the final test of any truth discovered. Thus, Adam sought to know good and evil by the power of his reason, independent of his Creator. Such is the doctrine of humanism,

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[1972] For example, in proper legal terms, the Mosaic Code is a *code* because, unlike human legislation, its parts are harmonious, one with another. "Scripture," Jesus said, "cannot be broken." *John* 10: 35.

[1973] See generally WINTERS, *supra* note 39, at ch. 5, § 4, for further elucidation of the complimentary consonance between general and written revelation through exegesis of *Psalm* 19. *Psalm* 19 presents God's revelation in creation (nature) as the harmonious compliment to His written revelation (Scripture): the natural creation being a general revelation unto condemnation and the written Word being a specific revelation unto life. *See also Romans* 1:18–20.

[1974] Hebrew: ידע.

[1975] Common law calls such intimate familiarity *carnal knowledge*.

[1976] *Daniel* 11:32. עם ידעי: Qal participle of ידע (*yada*), indicating a continuous state of action: "knowing." Young has, "[T]he people *knowing* their God are strong, and have wrought." YOUNG'S LITERAL TRANSLATION OF THE HOLY BIBLE (Robert Young trans., Greater Truth Pub. 2004) (1862).

teaching that knowledge is possible without deriving it from God. Since God, however, is the source of all knowledge, man's knowledge is only derivative.

The true knowledge that man derives only through a personal relationship with God brings with it responsibility: acknowledgement of God in fact and deed. Knowledge without acknowledgement of God, however, is *brute*:[1977] naked fact to the observer, and therefore, meaningless to him because he has divorced it from its divine and defining reference point. Such an abstracted fact appears to stand alone as an absolute, without relationship to any universal.[1978] Thus, all such knowledge is irrational, being divorced from the only stable fixed point of reference. Only relationship, however, brings reference, and therefore, meaning. Humanism sees knowledge as knowing many facts; therefore, humanism is content to compile knowledge (ever learning) and to define intellect as reasoning using those facts, but without any timeless and unchanging presupposition. By contrast, Scripture defines intellect as discernment between one fact and another, based upon the person and mind of God.

Because *yada* is relational, it is therefore, rational and personal; but humanistic knowledge is impersonal (being materialistic) and, therefore,

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[1977] A brute fact, says Cornelius Van Til, is an irrational fact: i.e., not defined by its relationship with a universal. Holding particular facts without knowing their rationality to their universal produces irrational behavior. *See* בער (*ba-air*) in *Proverbs* 12:1; *Isaiah* 19:11; and αλογος (*alogos*: alpha privative prefixed) in 2 *Peter* 2:12. The authors use these two terms to denote those having physical, but not intellectual, life.

[1978] Just as a dot on a blank sheet of paper labeled *St. Louis*, *Missouri* is meaningless to an aborigine fresh from the wilds of Borneo, so also is a fact one contemplates in the abstract without mental acknowledgement of the facts surrounding it and the Creator's purpose in providing this fact. With nothing to relate these to, both the dot on blank paper and the fact without acknowledgement of its Creator and His creation surrounding it are without perspective. But provide the aborigine with a map of the United States showing the setting of North America on the globe, relative to Borneo and the geographic features surrounding St. Louis, and the aborigine—once he gains the desire—will attain a fair idea of what another means when he says "St. Louis, Missouri." In the same way, an investigator willing to ponder the facts surrounding a single fact and the Creator behind all facts will attain a fair understanding of that single fact, i.e., its place and purpose in God's creation.

In the realm of law and government, the purpose behind legislation provides courts with guidance for interpreting and applying that legislation. The more one understands and knows the legislator, the better one knows what the legislator means by what he says. So also, the better one knows God through the experience of faith, the better one will understand what God means by what He has said in His Word. The more personal a person becomes with the God of creation, the greater understanding he will have of the particular facts in that creation. It is no accident that deep biblical faith gripped men such as Sir Isaac Newton, Blaise Pascal, Galileo, Gregory Mendel and other founders of the modern disciplines of science. Their intimate relationship with their Creator brought intimate knowledge of His creation.

without any defining relationship. Likewise, civil law is humanistic at bottom because it defines law according to the impersonal, and often disharmonious, will of the state as expressed by some individual, or combination of individuals, without commensurate respect for the desires of God or the rights of other individuals. By seeking to enforce the will of those controlling the state, civil law bows to the will of the powerful. By contrast, by seeking to define and protect the sanctity of personal relationships, from which rights and responsibilities flow, common law protects, above all, freedom of association. In modern civil-law systems, all activities, public and private, must defer to the will of the state. In true common-law countries, all things must defer to the various levels of rights, responsibilities, and liabilities arising out of lawful relationships.[1979]

Because the will of those that govern, as commanded by their legislation, is paramount in civil-law systems, prescribed mutual rights and responsibilities never demand control. Understood in this light, the drive of Islam to dominate becomes clear. Islam's god is impersonal and compassionless; therefore, forced conformity to his will is the all-consuming concern of Islam: in short, the message of Islam is submit or die. Thus, the symbol of Islam is the sword, an instrument used to terrorize and force one's *will* upon another through abject fear. By contrast, the symbol of Christianity is the Roman tree of crucifixion, an instrument through which God establishes an intimate *relationship* between the individual and his God through the religious affection of the worshiper in response.[1980] The terror of Islam subjects and incites domination of one faction over another; by contrast, the goodness of God[1981]—in spite of man's ingratitude—leads to personal repentance and freedom from such domination.

'Echdth: A Unit With Unity and Integrity

The Hebrew '*echdth*[1982] is the key term of the *Shema*[1983] of Israel, the oldest recorded creed known to man: "Hearken Israel! The LORD our

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[1979] *See* ROSCOE POUND, SPIRIT OF THE COMMON LAW 21–22 (1921).

[1980] "A people *knowing* [*yada*] their God," writes the prophet Daniel, "shall prevail, and act with effect." *Daniel* 11:32.

[1981] *See Romans* 2:4. χρηστοτης (*kraystotays*): goodness.

[1982] Hebrew: אחד.

[1983] Hebrew: שמע, meaning *listen* or, more accurately, "Hearken." *See Deuteronomy* 6:4. The ancient Hebrews took the term *shema*—the first word of this verse's Hebrew text—

God: the LORD is *one*."[1984] For centuries, religious Hebrews recited this creed daily to remind of its indispensable truths, which are the foundation stones for a single-minded understanding of God and His purposes. '*Echdth*, the word translated "one" in this creed, defies exact translation into English, but a brief explanation helps to understand it.

The meaning of '*echdth* is akin to our English term "unit" or "unity"; with this idea of unity comes harmony; thus, *'echdth* denotes integration. Unlike the English "one" or its adverb form "only" (*one*-ly), '*echdth* is neither ordinal (signifying that which is "first" in an order of things) nor is it cardinal, that is absolute (signifying singularity as distinguished from plurality). For example, United States coins carry the phrase *e pluribus unum*, oft translated "out of many, one," or as others render it, "unity out of plurality." The phrase means that though the United States comprises a plurality of fifty separate and sovereign states, these states are, nonetheless, *one* (unified) nation under God. America is an integration of States: a unity of a common origin and destiny. By analogy, the Godhead of the *Shema* is three distinct persons in perfected unity of gist and purpose. Moreover, Jesus expounds the *Shema* of *Deuteronomy* 6:4, declaring that it signifies His common being with the Father, i.e, "I and my Father," said Jesus, "are *One*."[1985]

Not only is the Godhead is a unit; the Godhead has unity. One can form a unit, however, without establishing unity. For example, the writer's cousin once told him that he could cure a certain belligerent tom cat from fighting with the other cats by tying Tom's tail to a coon's tail and hanging them together over the clothes line. Though such a deed will form a *unit*, it will never bring *unity*. In this case (if I know tom cats and coon cats), that which man has bound together will shred itself to flinders. It is, therefore, possible to join things together in a unit without unification. On the other hand, it is impossible to have unity without that

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for the name of this verse. Both *shema* and the seventeenth-century meaning of the English "hearken," carry the dual meaning of not only hearing but, also, heeding by obeying in response to what one hears.

[1984] One may also rightly translate *Deuteronomy* 6:4, "HARKEN Israel! The LORD our God is *one* [אחד ('*echadth*): signifying an integration of perfected unity in purpose and activity between the Father, the Son, and the Holy Spirit] LORD." *See generally Titus* 1:1–2 (revealing divine unity of purpose in the establishment of an inter-Godhead covenant). The term *επανγγελω* (*epanggelo*), here in the middle voice, signifies a self-proclamation, announcing future intention based upon a prior acts. In this case, the prior acts were the mutual promises of an inter-Godhead covenant based upon the life, death, and resurrection of Christ for the salvation of God's people.

[1985] *John* 10:30.

unity being a unit. Put another way, all unities are units, but not all units are unities.

Where there is common loyalty to a common objective standard beyond which individuals recognize no appeal, there is unity. For example, marriage of a Christian to a non-Christian creates a unit but not the quality of unity because two such persons are not united in *ultimate* purpose; there is no commonness at the foundation of their deepest aspirations. Therefore, combinations of individuals often form *units*—such as families, churches, and nations—by mere adherence each to the another; however, *unity* occurs only as two or more persons are loyal in common to that which is greater than them both, going to the ultimate concerns of human life. If that common devotion is to God's glory by the means of His written directives, the good resulting therefrom will exceed human imagination; one cannot think that big.[1986]

In this respect, the three persons of the Godhead[1987] are in unity of purpose and method. The relationship among the three is in common being and common mission: a unity. When Jesus declared, "I and the Father are *One*," He meant that He and the Father are never in conflict and are always in singleness of mind, will, and emotion—each thought and action in flawless harmony with that of the other, as well as with God the Spirit. That God the Father and God the Son are the same person was not Jesus' meaning; if it were, His prayer in *John* 17: 1–26 was to himself, an unreasonable, and even absurd, notion.

The chronicler's use of *'echdth* provides a concrete picture of the term's meaning. When Solomon dedicated the Temple of the LORD, Scripture states that the trumpeters and singers "became as one

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[1986] John the apostle signifies the doctrine of Christian fellowship with κοινονια (*koinonia*): the common forgiveness, purpose, loyalty, and commitment of obedience to God that brings unity among individual Christians. *See generally* 1 *John* 1:3, 6–7. See also generally *Genesis* 11:6, for the immeasurable potential of unity ('*echdth*) used for a godless purpose. True unity requires commonness at the fundamental level. "A leading French theologian, the late Doyen Emile Doumergue, once pointed out that fusion (true unity) without a true theological basis was nothing but confusion." DONALD GREY BARNHOUSE, THE INVISIBLE WAR 243 (1965).

[1987] The term Θειοτης (*Theiotays*) of *Romans* 1:20, sums up the attributes of God's majesty as Creator, without thought of His personal attributes. *Theiotays*, therefore, roughly approximates the Old Testament's אלהים (*'Elohim*). On the other hand, the Greek's term Θεοτης (*Theotays*) sums up the attributes of God as the keeper of promises, emphasizing His personal attributes. Thus, *Theotays* roughly approximates the Old Testament's יהוה (*Yaweh*), the personal covenant name of God. In sum—and as *Colossians* 2:9 signifies—, *Theiotays* denotes deity, emphasizing impersonal qualities; *Theotays*, on the other hand, denotes divinity, emphasizing personal attributes. *See generally* RICHARD CHENEVIX TRENCH, SYNONYMS OF THE NEW TESTAMENT 7–10 (photo. reprint 1953) (1880) (comparing and contrasting *Theiotays* with *Theotays*).

[‘*echdth*], causing a voice of one [‘*echdth*] to be made for praising and thanksgiving to the LORD.”[1988] ‘*Echdth*, then, is not a cacophony of conflicting noises, but a symphony of pleasing compliment; in its verb form, ‘*echdth* means, “to be and act in concert.”

‘*Echdth* also carries the idea of *integrity*: internal consistency kept from outside confusion. The relationship between the persons of the Godhead and with God’s created order has the greatest of such integrity. God’s created order is that body of truth of which all its parts are harmonious with all its other parts because each part of this body of truth springs from the same Creator. Further, because the God of all order has made and fashioned all creation, He has ordered creation harmonious with itself and its Creator, according to the unity of the Godhead. Mathematics is an expression of the orderliness of God’s creation that reveals its unity: “the language,” said Galileo, “with which God has written the universe.”

Scripture declares that God’s law is *perfect*.[1989] It, therefore, stands to reason that law and government consonant with God’s Word will reflect such a quality. A right worldview respecting law and government demands a tradition that maintains integrity by resisting encroachments that compromise its accord with Scripture. Where the common-law tradition reigns, its processes have proven its natural resistance to those doctrines that attempt to violate its integrity.

Shalom:
The Domestic Tranquility of God’s Order

The Hebrew term *shalom*[1990] is most often translated “peace,” but has a further-reaching significance. Indeed, we are to understanding peace in a way different from that of the world. “[M]y *peace* I give unto you; I do not give it to you according to [the understanding of] this world.”[1991] Jesus is a Hebrew, speaking to Hebrews holding the Hebrew view of peace that the Hebrew Scriptures give by the word *shalom*: a term packing more and different meaning than the English term “peace.”

[1988] 2 *Chronicles* 5:13a.

[1989] *See Psalm* 19:7. Hebrew תמימה (*tamimah*): from תמים (*tamim*), without blemish. The Old Testament uses the term to describe the Messiah: God accepts Him as the sacrifice for sin because He is *tamim*, without blemish and perfect in every way.

[1990] Hebrew: שלום.

[1991] *John* 14:27.

Shalom (peace) of the Old Testament is not the absence of conflict, but the presence of God's order, brought about by a yearning to please God. Shalom describes the order of God's coming kingdom and of His "new heavens and new earth."[1992] Biblical peace (shalom) results from a relationship with God ordered aright; such has been the conclusion of many. Augustine, early bishop of the church at Hippo, concluded that *shalom* is an ordering of one's life according to the orders of the God of all order. Such an ordering must begin with the individual's relationship with God. Only Christ's redemption removes the enmity between God and the individual by removing possibility of punishment for sin, establishing the proper ordering of that person's relationship with God, and resulting in tranquility.[1993] It is impossible for the Christian to receive the slightest wrath from God because the entire wrath that God could have justly poured out on him was instead poured out on Christ at His execution on the tree. God is no chiseler: Christ having fully paid for the Christian's sins, God will never force the Christian to pay more.[1994]

The phrase *liberty under law* and *ordered liberty* were once harmonious with the ideals of our common-law tradition; Americans saw that liberty ordered under law was the necessary prerequisite to domestic tranquility: a declared purpose of our constitutional government.[1995] To see God's order of His world, to accept that arrangement, and then to order one's life accordingly is to have the true life and worldview. The purpose of the common law is to provide the proper order of law and

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[1992] *Revelation* 21:1.

[1993] Augustine demonstrates that the mind, when ordered in subjection to God's Word, is a powerful scientific tool. As Gregory Mendel extrapolated the hidden laws of the genetic code without the benefit of scientific tools, using only a handful of peas and a small plot of dirt; Augustine, lacking the tool of Old Testament Hebrew, rightly discerned God's intended meaning of the Hebrew concept *shalom* or "peace." Using the then popular, but loosely translated, Greek version of the Old Testament (the Septuagint), Augustine systematically categorized the Old Testament's use of *shalom*. Then, by discerning these uses in light of Scripture's organization, he arrived at his conclusions.

[1994] *See John* 19:30. At the end of His crucifixion, Jesus stated: "It is *paid in full*." The phrase "paid in full," well translates τετελεσται (*tetelestai*). Among the ancient Greek papyri, "[r]eceipts are often introduced by the phrase τετελεσται [*tetelestai*], usually written in an abbreviated manner." JAMES HOPE MOULTON AND GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK NEW TESTAMENT ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES 630 (1930). "Paid in full" is the modern English equivalent *tetelestai* written on *receipts*. Jesus' statement perfected His payment of each Christian's debt for his sin. This verb, in this form, includes two acts necessary for proper release of debt: payment in full and signing of the receipt or release. The first act benefits the payee; the second act protects the payor.

[1995] *See* U.S. CONST. preamble. Were the Constitution a ring of gold and the Constitution's preamble a suite of jewels on that ring, *domestic tranquility*—being set in the center of the preamble—is the largest jewel in the suite.

government founded upon right, as opposed to might. The common law has called this idea "ordered liberty" and *due process*.[1996]

A right worldview of law and government recognizes that freedom is possible only where those to whom God has granted freedom order that freedom under God's standards: His will revealed by Scripture. True and complete freedom is available only to those the Son makes free—those empowered to order their lives according to His orders.

Mishphat:
Ordering Law and Government According to God's Orders

The Hebrew term *mishphat*[1997] signifies the befitting functions of, and dealings between, the three branches of government: legislative, executive, and judicial. It also signifies government's relationship with the individual. *Mishphat* stems from a root often translated "judgment":[1998]

> [*M*]*ishphat* . . . [r]epresents what is doubtless the most important idea for correct understanding of government . . . Frequently associated with *sedeq* [צדק: righteousness or justification] . . . in OT descriptions of God's reign and ways with his creatures, this idea lies at the very heart of a true understanding of the Biblical world-and-life view.[1999]

Mishphat[2000] carries more freight than one or two English words will bear; when used to signify right government, the phrase "proper

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[1996] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[1997] Hebrew: משפט.

[1998] Hebrew: שפט (*shofat*).

[1999] 2 THEOLOGICAL WORDBOOK OF THE OLD TESTAMENT, *supra* note 114, at 948–49.

[2000] *Mishphat* is not exclusively a judicial word. Though it can signify a judicial sentence following judgment (*see, e.g., Jeremiah* 26:11, 16), it does not strictly speak of judgment as that which a judge sitting on the Bench delivers. *Mishphat* signifies the proper relationships, methods, and procedures God requires that men use in the administration of government. On the other hand, the Hebrew דין (*din*)—from which the Hebrew tribe *Dan* derives its name—*is* a judicial term denoting a judge's delivery of his finding. *Mishphat* defines the relationships among government's branches; *din* denotes the court's pronouncement of judgment in a certain legal case. *Mishphat* concerns how to operate government as distinguished from what government seeks to accomplish; *din* is a judge's legal conclusion. *Mishphat* denotes the manner or method; *din* denotes the finding or judgment. In God's government, how one serves (*mishphat*) is as important as what one

administration of justice" aids in understanding its meaning; when used to signify wrong government, the phrase "improper administration of government" is helpful.

Mishphat is an adaptable word but, regardless of the context, it always refers to God's ultimate authority in matters of law and government. In addition, *mishphat* recognizes the common law's guiding fundamental: judicial precedent or *stare decisis*. In sum, *mishphat* signifies proper and right relationships between the branches of government and the relationships between these offices of government and the governed. The Old Testament's use of *mishphat* gives insight into God's desires concerning man's administration of law and government.

For example, David, King of Israel, determined that it was right and proper to move the Ark of the Covenant to a permanent resting place in Jerusalem. Unfortunately, in his desire to act in the spirit of the law (substance) by focusing on the intended result, he went about doing so in an improper manner. In brief, David neglected the letter of the law (form and procedure), resulting in the death of Uzzah,[2001] David's personal discouragement, and unnecessary delay. David angered God and became confused. David knew his intent was sincere, but good intentions are only the beginning of obedience; the manner in which one carries out his good intentions must also be right. David, at length, searched out the law on the matter, grasped the reason for God's displeasure, and addressed the Levites: "[T]he Lord our God made harm among us because we did not fully search out the required ordering [in His law]."[2002]

By neglecting to discern[2003] the LORD's procedural commands concerning the Ark as holy, the Israelites failed to respect God's holiness.

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concludes or achieves. Any judgment concluded from a less-than-proper process is, in and of itself, lawless.

[2001] *See generally* 1 *Chronicles* 13. With sound reasons, physicists have speculated that God's design of the Ark of the Covenant made it an intense kind of Leiden jar: over time the wooden Ark, thickly foiled with gold inside and out, collected deadly reserves of static electricity. Anyone touching it risked—if not assured—death by constituting a ground through the human body, the conductor through which high voltage will travel. SstsObjects that collect static electricity because foiled inside and out with conductive metals the scientific community calls "Leiden jars," after the Dutch city of Leiden, where scientists discovered the foregoing principle of electricity. The text is silent, however, concerning whether God used this principle to slay Uzzah.

[2002] 1 *Chronicles* 15:13b. "[T]he required ordering" David speaks of is best understood as *the manner prescribed* by God's Word.

[2003] Disobedience arises from the mind lacking mental discernment. *See* 1 *Corinthians* 11:29–30. The exercise of right discernment is the biblical meaning of holiness; the skill developed by exercising this discernment is the biblical meaning of intelligence. Verbal articulation of differences between one thing and another, by comparison and contrast, sharpens discernment; to do so is a mental discipline. Holiness begins in the mind by

In short, they forgot to search out the law of the LORD. Jesus told the woman at the well that, indeed, the spirit of truth is necessary, but the letter of God's standard is also necessary.[2004] Just as there is no right way to do wrong; there is no wrong way to do right. The right worldview of law and government will take into account that the spirit of the law is discernable from the letter, including every *jot* and every *tittle*.[2005] On the other hand, so also, only the light of the Spirit will quicken the letter of God's written revelation to right application. The letter without the spirit kills and—according to Uzzah's experience—the spirit without the guidance of the letter is deadly as well.[2006] "It is not the words of the law,"

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drawing proper distinctions. This is the meaning of loving the LORD with one's *entire* (כל: *col*) being (*see Deuteronomy* 6:4–5), which includes one's mind. *See Mark* 12:29–30. Mark uses *διανοια* (*dianoia*), oft translated "mind," to denote one's discipline in the ability of godly discernment, arising from one's rightly-informed conscience and incited into exercise by moral affections for one's Creator.

[2004] *See John* 4:20–24.

[2005] *See Matthew* 5:18. The *jot* (meaning a small mark) is an English translation of the Greek *'ιωτα* (*'yota*). Because Matthew's Hellenized Hebrew readers of Greek readers, some ignorant of the Hebrew tongue, the evangelist uses *'yota* to transliterate the Greek letter *ι* (*'yota*) from the Hebrew י (*yodh*)—the smallest of the Hebrew letters. *Yodh* has remained the smallest letter in the Hebrew alphabet since the inscriptions of the first century A.D., but doubtful before that time. *See* GESENIUS' HEBREW GRAMMAR, *supra* note 152, xvii, tbl. of *Early Semitic Alphabets*.

The *tittle* is a serif appended to the ends of parts of some Hebrew letters, transforming these into another Hebrew letter. Depending upon the presence or absence of the serif, the letter ח (*kath*) becomes ה (*hay*), ו (*wow*) becomes ז (*zayin*), and ב (*beth*) becomes כ (*calf*). In certain instances, the transformation of a single letter by the presence or omission of a serif changed one Hebrew word to another Hebrew word, which altered the meaning of the entire sentence, thereby changing delivery of an entire thought. Jesus affirms the detailed inspiration of Scripture. To affirm the inspiration of the details is to affirm the inspiration of the principles.

[2006] Samuel Rutherford believed that an ample understanding of *mishphat*, as used in 1 *Samuel* 8:11, is necessary to discern wrong activities of government. In response to Israel's lust to have a king like other nations, the prophet Samuel wrote, "This will be the manner (*mishphat*) of the king who shall reign over you . . . ." Given the context and other examples of its use with the Hebrew negative לא (*low*) to signify the manner of godless government, Rutherford argues that in the foregoing verse *mishphat*es precludes any idea that God requires some complex understanding; rather, it is a straight forward statement of unavoidable cause and effect. Thus, without condoning the result, the prophet Samuel prophesied the result of godless purposes in government:

> But let us try the text first, משפט המלך [*mishphat hamelek*: "manner of the king"] the word cannot enforce us to expone משפט [*mishphat*] a law, our English rendereth, ["]Show them the manner of a king.["] Arr. Montaus turneth it *ratio Regis*. I grant the LXX, render it *το δικαιωμα του Βασιλεως* . . . the word משפט signifieth not always a law . . . .

wrote Justice John Marshall Harlan, "but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul."

Hebrew and Greek Terms for Law Contrasted

The Old Testament Hebrew term *torah*[2007] is most often translated *law*. The Assyrian cognate root *toretu* occurs only in reference to deity because the ancients understood that deity is the only source of law: the final arbiter of right and wrong. The noun *torah* stems from the trilateral Hebrew verb root (*yarah*),[2008] signifying, at bottom, projection of the pointed index finger and hence, to point out or direct. The noun and verb forms occur together in *Exodus* 24:12b, "I will give to you tablets of stone, and law [*torah*[2009]] and commandments which I have written, to direct [*yarah*: literally, to ap-point or "point out" the way for] them."[2010] Therefore, *torah* (the noun form) signifies "law" as "the way ap-*point*-ed" or "pointed" out; the verb form of *torah* means, "to point out the way."

When Homer, the earliest of the known Greek writers, signified law, he most often used the term *δικη* (*dikei*), from the root *δικ–* (*dik–*). Comparable to *torah*, *dikei* signified a pointing out by directing another's attention; moreover, *dikei* signified "usage" and "custom." *Νομος* (*nomos*)—the term for *law* that later dominated the political vocabulary of the Greek city-states and the Eastern Roman Empire's civil law—never appears in Homer's writings.

SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 73 (photo. reprint 1982) (1644) (archaic spelling in original). By this principle, interpreters observe that all the Bible has recorded to have been said and done, was said and done; but not all that the Bible has recorded to have been said and done was right. By the same principle, under the common law of evidence hearsay statements offered in court only for evidence that the statement was spoken, but not as evidence for the truth of the matter the statement asserts, are admissible before the Jury. The Bible does not offer all that it records for the truth of that which it records was said and to condone the rightness of that which was done; but it offers every detail of Scripture for the truth that what Scripture says was said and done, was indeed said and done.

[2007] Hebrew: תרה.

[2008] Hebrew: ירה.

[2009] Hebrew: תרה.

[2010] ROBERT GIRDLESTONE, SYNONYMS OF THE OLD TESTAMENT 206, 225 (1897). The English term "judge" is, in kind, like to the Hebrew term *torah*. A *judge* is one who points out the right application of the law by speaking. From oath (*jur*) and speak (*diction*), the term "judge" denotes one speaking under oath. The judge accepts his office knowing that it carries heightened consequences for false pronouncements. Thus, common-law judges swear to uphold the law.

The Greeks' changing usage of terms for *law* through the centuries reveals their devolving shift from viewing law as that which man must seek and discover, to that which man produces by his faith in his powers of logic and reason. Early on, the Greeks used *θεμις* (*themis*), signifying that their concept of law began as divine ideals evidenced in customs and confirmed by human judges. Homer, for example, uses *themis* to denote two concepts: the unwritten instructions of a father to his family and the unwritten conclusions resulting from consultations[2011] of political assemblies.[2012] In like ideals, Sophocles sets forth the early Greek conception of *themis* and *dikei* as eternal custom: *e.g.*, "These laws are not for now or for yesterday, they are alive forever; and no one knows when they were shown to us first." The Greeks came to see law as *δικη* (*dikei*): the judge's *act* of measuring behavior against custom to arrive at judgment. *Dikei*, as does the Hebrew's term *torah*, denotes the law's application or fitting way pointed out in a specific case.

Over time, however, *nomos* came to be the Greeks' dominant word for law: written law as the product of *νους* (*nous*), the Greek's term for the human mind.[2013] Thus, *nomos* became the civil law's term for law as the expression of the will of the imperial Greek city-state: perfected reason from the mind of man, from which there is no appeal. The Greek living at the zenith of Hellenism looked to the intellectual aristocracy to tell him right from wrong. These notions passed into the Digests of Justinian:

1 *πας εστι νομος ευρημα μεν και δωρον θεων,*
2 *δογμα δ' ανθρωπων φρονιμν,*
3 *επανορθωμα δε των εκουσιων*
4 *και ακουσιων αμαρτηματων,*
5 *πολεως δε συνθηκη κοινη,*
6 *καθ' ην πασι προσηκει ζην τοις εν τη πολει.*

Though brief, the foregoing definition of law also contains the controlling points of the civil-law tradition that abide into the modern world and dominate the thinking of present-day civilians: *first*, the source of law is divine (line 1); *second*, law consists in *dogmas* or decrees from the minds of men (line 2) (the divine source); *third*, law includes "corrections of

[2011] Greek: *βουλαφοροι* (*boulaforoi*).

[2012] Greek: *αγορα* (*agora*).

[2013] See generally MAINE, *supra* note 639, at 4, for discussion of *νομος* (*nomos*) and *νους* (*nous*), as the Greeks used these terms through the centuries. Tracing the history of words used by the civil-law tradition leads to the source of the passions and notions that spawned the civil-law.

authority" (changes of decrees) and hearing of sins, or confession (lines 3–4); *fourth*, the purpose of the law is to make abundant the life of the city dweller—those fellowshipping in the covenant of the city (lines 5–6).[2014]

To sum up, the following pattern emerges from the history of Greek usage of terms for *law*: a progression from custom to measuring and weighing according to custom to dependence on the human mind as the measure of law. The Greeks' dependence upon the human mind dominated the Greek age of reason, when men convinced themselves of their ability to construct true law and government by the workings of their pure (unaided) reason. Luke, with his Gospel, targeted this error, presenting Christ as the only man able to exercise true reason. Luke's Gospel makes direct reference to Jewish civil lawyers,[2015] their errors of thinking, and Jesus' correction of those errors more times than any other biblical writer.[2016]

Summing up Key Bible Terms for Law and Government

The chief characteristic of the Godhead is perfected integrity ('*echadth*): God is *one*. The persons of the *Godhead*[2017] hold a common essence, purpose, and will. God's attributes are inseparable from God and His perfection is un-improvable. He has purposed to extend His order (*shalom*) into this present age and "world order" (*cosmos*). His order of relationships among the powers of government is His *mishphat*. *Torah*, the Hebrew term for law, demands that law be an objective standard;

[2014] *See* 2 A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 237 (William Smith, William Wayte, G.E. Marindin eds., London, John Murry 1891). Scripture and the common law agree with the civil law in that the fountain of law is divine, i.e., from deity; but differ as to which deity is the worthy source. Because the civil law takes the mind of man to be the source, it must allow for error; thus, it accepts changes and corrections. Further, civil law demands confession of all to the state. Another noteworthy difference—the goal of the civil law is life more abundant in the fellowship of *the city*, which is the state. By contrast, Christ promises life more abundant in the fellowship of His cleansing from sin; further, it is the purpose of the common-law to protect all such fellowship: relationships and associations.

[2015] Greek: *νομικος* (*nomikos*).

[2016] *See, e.g., Luke* 7:30, 10:25, 11:45, 11:46, 11:52, 14:3. In addition, Luke is no incidental New Testament writer: though Luke wrote only 2 New Testament books, he wrote more pages of the New Testament than did any other writer.

[2017] See generally *Romans* 1:20, for Scripture's use of *θειοτης* (*theiotays*): literally, "that which is the highest order of divinity." *Theiotays* denotes divine persons. In *Romans* 1:20, therefore, the term connotes the persons of the Godhead in their perfected commonness of essence and will and their infinitely close relationships. *See* WALTER BAUER, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE 354 (William F. Arndt & F. Wilbur Gingrich trans., 5th ed. 1979) (1958).

while *nomos*, the Greek term for law, presents law as a product of the human mind (*nous*), a subjective standard. When the New Testament, however, uses *nomos* with the definite article, it denotes the Creator's standards. At the time the New Testament was written, the only Greek term available for law was *nomos*.

A correct worldview of law and government will take into account the concepts found in the previous six terms as Scripture uses them. The right world-and-life view demands that men see this present age of human history as God sees it and then desire for it what God intends. If one takes this point of view, Scripture promises confidence and gladness.[2018] Glorifying God in this way brings reasonableness, enjoyment, and contentment: peace (*shalom*) that is superior to one's entire power of reason.[2019]

4
Development of the Western Calendar

In medieval days, confusion of dates was common. The appendix to volume 2 of Blackstone's Commentaries quotes a charter of feoffment dated "Friday next before the feast of St. Margaret the Virgin in the sixth year of the reign of King Edward, the son of King Edward." The sixth year of Edward II. began 18 July 1312; the feast of St. Margaret begins 20 July. Turning to the calendar for July 1312, one finds that 20 July was a Thursday, therefore, the charter's execution was on 14 July 1312.[2020]

The West bases its calendar upon the birth date of Jesus Christ. Before the birth of Christ, however, the Romans often dated events by the names of the consuls in office during a particular year. Most historical materials concerning Rome, however, use A.U.C. dates—*Anno Urbis Conditae*,

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[2018] *See Psalm* 16:8–9.

[2019] *See Philippians* 4:7a: *η ειρηνη του θεου η 'υπερεχουσα παντα νουν . . . .* According to these words, one's desire (*καρδιας: kardias*); one's brain, senses, and processes of pure objective reason exercised by the inter-working of these (*νουν: noon*); and the conclusions and purposes at which one arrives by the processes of objective reasoning are all vulnerable to error unless the peace of God extends over (*'υπερεχουσα: whopercoosa*) them all in aggressive protection (*φρουρησει: frooraysei*). In short, God's *shalom* (order) is God's provision that protects one's reasoning from error.

Anxiousness, fear, and worry make one vulnerable to false arguments of necessity, expediency, and the quick fix: anything to relieve one's pain of anxiety. Such conclusions, however, rest for their presupposition on fear of this world, instead of on faith in God, and will short circuit sound reason and reasonableness in judgment (*το επιεικες: to epiaykes*). *See Philippian*s 4:5. Paul the apostle, therefore, exhorts his readers to put aside worry and make their request to God, which will result in His peace. *See also* 2 *Timothy* 1:7.

[2020] William Franklin Fratcher. For this app. 4, the writer has drawn from information provided by W.F. Fratcher.

meaning from the year of founding of the city, i.e., Rome—, that is 753 B.C. (before Christ). Thus, Rome has attributed the date of Julius Cæsar's murder to 15 March, A.U.C. 709, which corresponds to 15 March 44 B.C.; thus also, emperor Claudius began the conquest of Britain in 796 A.U.C. or A.D. 43—*Anno Domini*: "in the year of the LORD," i.e., after Christ's birth. English legal and historical materials commonly date events by regnal years of English sovereigns, which are convertible into A.D. dates with the aid of a list of English sovereigns using the A.D. dates of their reigns.[2021]

Numa Pompilius second King of Rome, reigning from 715 to 673 B.C., divided the year into twelve months. At that time, the year began on 1 March, as the Latin ordinal names *September* (seventh), *October* (eighth), *November* (ninth), and *December* (tenth) indicate. Numa Pompilius's twelve months, however, contained a total of only 355 days. Therefore, the king—and after the abolition of the monarchy in 510 B.C., the *Pontifex Maximus* in the dual role as chief priest and emperor of Rome—needed to put in an extra month now and again to keep the calendar year from shifting seasons too far, causing confusion. The chief priests used this power over the calendar as a political tool, lengthening and shortening years to prolong or cut short the terms of public officers. By 48 B.C., the vernal equinox, which in the time of Numa Pompilius had fallen on 25 March, was three months off its proper date because of the minor inaccuracy of the 355-day calendar.

Then Julius Cæsar, on becoming *Pontifex Maximus*, stopped political manipulation of the calendar by giving enough days to each of the twelve months to total 365 days in three years out of four, and 366 days in the fourth year. Nowadays, we call this longer fourth year leap year. In addition, a statute of 153 B.C. had moved the beginning of the year to 1 January, causing the vernal equinox to fall on 25 March. Further, the old Roman eight-day week gave way to the Christian adoption of the Hebrew seven-day week. The Romans called this the Julian calendar.[2022]

The Julian calendar provided for an approximate year of 365.25 days. The true solar year, however, is 365 days, five hours, forty-eight minutes, and forty-six seconds. Thus, the Julian year was eleven minutes and fourteen seconds too long, which amounts to one day in 128 years. Because of this deviation between the true solar year and the Julian

[2021] See generally app. 5 of this book (listing English sovereigns, according to the dates of their reigns).

[2022] Julius Cæsar likely established the Julian calendar at the advice of Alexandrian Greek astronomer Sosigenes.

calendar year, by A.D. 325—the year the Council of Nicea laid down the rules for computing the date of Easter—the vernal equinox fell on 21 March. By A.D. 1582, the vernal equinox fell on 11 March.

In March of A.D. 1582, pope Gregory XIII, as *Pontifex Maximus*, promulgated a bull commanding observance of his new Gregorian calendar. Gregory ordered that the day after 5 October A.D. 1582 shall become 15 October, and that the world shall omit leap year in centenary years that are not multiples of 400. Thus, the years 1600 and 2000 were leap years, but the years 1700, 1800, and 1900 were not. The Gregorian calendar restored the vernal equinox to 21 March, where it had been in 325, the year of the Council of Nicea. During the years 1582 and 1583, nations the Roman Church controlled adopted the Gregorian calendar; in 1700, Protestant Germany accepted it. The Gregorian year, however, is twenty-three seconds too long.

The English Calendar and the Common Law

The English common law followed the Julian calendar, but began each year on 25 March. Because 1700 was a leap year under the Julian calendar, but not under the Gregorian calendar, the difference between the two became eleven days in that year. Thus, George Washington was born on 22 February 1732 under the Gregorian calendar, but on 11 February 1731 under the common-law calendar then in force in Virginia. Because the continental European states and historians began the year on 1 January, the British often dated materials referencing dates between 1 January and 24 March with both. Thus, George Washington's birth date was written "11 February 1731/1732," 1731 being the English legal year and 1732 the Gregorian year. The British Calendar Act of 1750 provided that the first day of year 1752 and subsequent years shall be January 1. Since the day following 2 September 1752, there has been no difference between English dates and those of other countries, except Russia, which retained the Julian calendar until after the Russian Revolution of 1917; for a few years, revolutionary France had a peculiar calendar of its own.

The medieval world commonly dated documents by reference to saints' days and church feast days, convertible into the days of the month only by use of a table of saints and feast days. Common-law courts usually cite English judicial opinions by the regal year of the reigning sovereign and the term of court, of which there are four: Easter, Trinity, Michaelmas, and Hilary. Before the middle of the fifteenth century, *Easter Term* began sometime between 8 April and 12 May, depending on

the date of Easter, and ended sometime between 4 May and 7 June; *Trinity Term* began sometime between 27 May and 30 June and ended sometime between 17 June and 21 July; *Michaelmas Term* began on 9 or 10 October and ended on 28 or 29 November; *Hilary Term* began on 23 or 24 January and ended on 12 or 13 February.

In the years 1541, 1641, and 1752, the courts made slight changes in these term dates. In any event, it is necessary to consult an appropriate table in order to convert a term date into a month and A.D. year date. If the regal year cited began or ended in the middle of a court term, it is at times difficult to determine the year. Modern editors of legal materials require that writers reference the A.D. year by regal year and term of court and place it in parentheses after the citation. Because, however, of the difficulty of conversion there remain different dates to which legal materials and records attribute certain statutes and cases. For example, the Statute of Uses (27 Hen. 7) is sometimes dated A.D. 1535, but at other times A.D. 1536. Since A.D. 1964, Parliament has numbered statutes only by A.D. year.

5
British Sovereigns

House of Valhalia:

Woden.[2023]	*c.* 300 A.D.
Beldeg.	
Brond.	
Frithogar.[2024]	
Freawin.	
Wig.	
Gewis.	
Esla.	
Elesa.	

***House of Wessex*:**

Cerdic.[2025]	519–534

[2023] According to the *Anglo-Saxon Chronicles* recorded by Asser, Woden was the seventeenth generation from Noah through Noah's son Sceaf—born on the Great Ark, during the Noahic flood—and seven generations from Geat the Anglo-Saxon founder of the kingdom of Geating in southern Sweden. About this time, the Britons elected the king of Cornwall Alyssglapiywlws overking of all Britons.

[2024] In A.D. 378, after Rome denied the Visigoths' (meaning *West Goths*, having migrated from present-day Sweden) request to enter Rome's empire, Frithogar defeated the Roman emperor Valens at Adrianople; almost a quarter million Visigoths poured into the Roman Empire. By A.D. 407–410, they had sacked Rome; by A.D. 426, they controlled most of present day Spain. The Goths gave Spain the community-property law of their folk law, which the Spaniards carried into the now Western United States.

[2025] Cerdic lead the Anglo-Saxon invasion of Britain of A.D. 496. Though not all English sovereigns descend from their immediate predecessors, they all—except the House of Denmark, Harold II., and William I.—have a common ancestor in Cerdic. Because the wife of William I., Matilda, descended from Alfred the Great and because Alfred descended from Cerdic, all descendants of William I. by Matilda

Cynric.	534–560
Ceawlin.	560–592
Ceol.	592–597
Ceolwulf.	597–611
Cynegils.	611–643
Kenwalk.[2026]	643–672
Sexburga.	672–674
Escwin.	674–676
Kentwin.	676–685
Ceadwall.	685–688
Ine.	688–726
Æthelard.	726–740
Cuthred.	740–756
Siegbert.	756–757
Cynewulf.	757–786
Bertric.	786–802
Egbert.	802–839
Æthelwulf.	839–858
Ethelbald.	858–860
Ethelbert.[2027]	860–866
Ethelred I.	866–871
Ælfred *the Great*.[2028]	871–899
Edward *the Elder*.[2029]	899–924
Athelstan.	924–940
Edmund I.	940–946
Edred.	946–955
Edwy *the Fair*.	955–959
Edgar *the Peaceful*.	959–975
Edward *the Martyr*.	975–978
Ethelred *the Unready*.	978–1016
Edmund Ironside.	4/23—11/30 1016

***House of Denmark*:**

Chanute *the Mighty*.	1016–1035
Harold I.	1035–1040
Hardechanute.	1040–1042

***House of Wessex Restored*:**

Edward *the Confessor*.	1042–1066
Harold II.	1/6—10/14 1066

***House of Normandy*:**

William I.[2030]	1066–1087
William II.	1087–1100
Henry I.[2031]	1100–1135
Matilda.	2/2—11/1 1141
Steven.[2032]	1135–1154

House of Anjou (Plantagenet)**:**

Henry II *Curtmantle*.[2033]	1154–1189
Richard I.	1189–1199
John *Lackland*.[2034]	1199–1216

descended from Cerdic. Moreover, the wife of Henry I., also named Matilda, was the great-granddaughter of King Edmund Ironside, a descendant of Alfred the Great and thus also of Cerdic. Therefore, the descendants of both Matildas descended from Cerdic.

[2026] Kenwalk or *Cenwalh*, was the first Christian King of England. He erected Westminster Cathedral.

[2027] Ethelbert issued the earliest known written compilation of the Anglo-Saxon Volkriht.

[2028] Alfred, the first to reduce the Anglo-Saxon tongue to writing, issued a short statement of Scripture's and the common-law's first principles called the *Laws of Alfred the Great*.

[2029] Edward's *Laws of Edward the Elder*, include an injunction to follow his father's *Dom-Book*.

[2030] Matilda, wife of William I., descended from King Alfred the Great.

[2031] Henry I. married Matilda of Scotland, great-granddaughter of King Edmund Ironside.

[2032] Steven forbade teaching of Roman civil law at Oxford. When Vicarious, a graduate of Rome's university at Bologna, began civil-law lectures at Oxford, Steven silenced him.

[2033] Henry II., called the father of the common law, rejected encroachments of civil law and established the writ system of the common law.

[2034] During John's coronation sermon, the Archbishop of Canterbury stated that the English monarchy was not hereditary,

Henry III.[2035]	1216–1272
Edward I.[2036]	1272–1307
Edward II. (*deposed*)	1307–1327
Edward III.[2037]	1327–1377
Richard II. (*deposed*)[2038]	1377–1399

***House of Lancaster*:**

Henry IV.[2039]	1399–1413
Henry V.	1413–1422
Henry VI. (*1st Reign*)	1422–1461
(*2nd Reign*)	10/9—1470 to 4/14—1471

***House of York*:**

Edward IV.	1461–1483
Edward V.	4/9—6/25 1483
Richard III.	1483–1485

***House of Tudor*:**

Henry VII.[2040]	1485–1509
Henry VIII.	1509–1547
Edward VI.	1547–1553
Lady Jane Grey.	7/6—7/19 1553
Mary I (*Bloody Mary*).	1553–1554
Phillip & Mary.[2041]	1554–1558
Elizabeth I.	1558–1603

***House of Stuart*:**[2042]

James I.	1603–1625
Charles I. (*beheaded*)	1625–1649

***Commonwealth*:** 1649–1660

***House of Stuart Restored*:**

Charles II.[2043]	1660–1685
James II. (*deposed*)[2044]	1685–1688
William & Mary.[2045]	1689–1694
William III.[2046]	1694–1702
Anne.	1702–1714

***House of Hanover*:**

George I.	1714–1727
George II.	1727–1760
George III.	1760–1820

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but selective. By signing Magna Carta, John affirmed common-law principles.

[2035] During the reign of Henry III., the House of Commons formed.

[2036] By requiring the recordation of judicial opinions for easy access, Edward I. reinforced *stare decisis*—the common law's polestar. In addition, in 1266 he signed the Agreement of Kenilworth, at Kenilworth Castle in Warwickshire, conceding the limitations of his kingship, thereby buttressing common-law government.

[2037] Parliament forbade Edward III. from meddling with the courts; required all to obey law, even if the king's command is different; and forbade any Englishman from answering Rome's summons without leave of Parliament.

[2038] Because Richard II. assumed civil-law powers, Parliament deposed him.

[2039] Never considering his kingship hereditary, Henry IV. rested his kingship's authority upon the choice of Parliament. His was a constitutional (limited) kingship. Thus, he acted only upon the advice and consent of Parliament. Having sworn never to act solely upon his own will, his authority, therefore, rested on common-law principles, and not upon his power.

[2040] The kingship of Henry VII. was at the request of Parliament, further confirming common-law's limited government.

[2041] Bloody Mary's husband Phillip II of Spain supported civil-law inquisitions in Spain and in England.

[2042] The House of Stuart attempted to establish civil law in England.

[2043] Parliament invited Charles II. to reign on the condition that he observe the common-law principals of government.

[2044] By trying to meddle with the courts, James II. violated common-law principles.

[2045] William & Mary reigned at Parliament's request and by Parliament's advice and consent.

[2046] The administration of William III. heavily influenced American common-law government.

George IV.	1820–1830
William IV.	1830–1837
Victoria *the Good.*	1837–1901

***House of Windsor*:**[2047]

Edward VII.	1901–1910
George V.	1910–1936
Edward VIII.	1/20—12/11 1936
George VI.	1936–1952
Elizabeth II.	1952–

[2047] The House of Windsor descends from Prince Albert of Sax-Coburg-Gotha, consort of Queen Victoria; Wettin was the family name of this House. Because England was at war with Germany during World War I, George V. changed the family name to *House to Windsor*.

6
Noteworthy Civil-Law Dates

c. 2350 B.C.	Settlers found Babylon.
753	Romulus founds Rome.
715	King Numa Pompilius establishes twelve-month calendar of 355 days.
510	Roman monarchy overthrown; government made a public affair of majorities (republican).
451	*Twelve Tables* of Roman law enacted.
367	Office of *Praetor Urbanus* established.
243	Office of *Praetor Peregrinus* established.
150	*Praetor Urbanus* empowered to create new forms of action by *formula*.
133	By testamentary will of King Attalus, his city Pergamos and his priestly and royal offices, pass to Rome.
48	Julius Cæsar made semi-deified Roman dictator.
44	Julius Cæsar assassinated.
117 A.D.	Emperor Hadrian assumes power to legislate.
295	*Gregorian Code*.
324	*Hemogenian Code*.
330	Roman Empire capitol moves to Constantinople.
426	*Law of Citations* (Valentinian).
439	*Theodosian Code*.
450	Rome's Twelve Tables Code put in writing.
476	Rome's Western Empire falls.
506	*Lex Romana Visigothorum* of King Alaric II.
534	*Corpus Juris Civilis* of emperor Justinian.
888	*Basilicas* of emperor Leo VI.
1088	Roman Church founds first university at Bologna, dedicating it to the supremacy of Justinian's Code.
1345	Constantine Harmenopoulos authors *Hexabiblios*.
1348	*Las Siete Partidas* of King Alphonso XI.
1453	Constantinople falls, officially ending Roman Empire.
1804	France adopts Justinian's Code as the *Code Napoléon*.
1825	Louisiana enacts civil-law Code.
1866	Italy enacts civil-law Code.
1900	Bismarck enacts German civil-law Code.

7
Noteworthy Common-Law Dates

700–100 B.C.	Celts migrate to Britain with their folk law.
43–80 A.D.	Romans invade Britain.
300	Angels and Saxons begin raiding Britain.

406	Visigoths invade Roman Empire.
407	Rome pulls her legions from Britain to repel Visigoths.
408	Anglo-Saxon migrations begin, bringing their folk law to Britain.
c. 496	Continental Anglo-Saxon King, Clovis, issues *Lex Salica*: earliest known compilation of the *Volkriht* (folk law).
519	Kingdom of Wessex established under King Cerdic.
c. 860	Danish (Jute) invasions of England begin.
c. 865	King Ethelbert issues earliest known written compilation of the Anglo-Saxons' *Volkriht* (folk law) in England.
c. 871	King Alfred invents written English and records common-law ideals from in biblical terms.
959	Kingdom of England united under King Edgar.
1066	Norman Conquest; King William I. affirms common law by upholding the *Laws of Edward the Confessor*; Norman French replaces Anglo-Saxon in the common-law courts.
c. 1150	King Steven silences Vicarious's teaching of civil law at Oxford.
1154–1189	Henry II. further establishes common law by initiating the writ system.
1215	Magna Carta affirms principles of *Volkriht*.
1265	Simon de Montfort summons first Parliament.
1272–1307	Edward I. reinforces common law as the *law of the land*; establishes nation-wide recordation of judicial opinions.
1328	Parliament enacts statute requiring that law be obeyed, even when the King commands contrary.
1362	Only English now spoken in common-law courts.
1378	Wyclif seeks to temper abstract reason (scholasticism) with experience (precedence) by replacing the teaching of civil law at Oxford with the teaching of common law.
1471	Fortescue echoes Wyclif's loyalty to common law with *De Laudibus Legum Anglie*.
1608	Justice Coke challenges the James I. and his loyalty to the civil law's divine-right-of-kings doctrine.
1620	English Puritan migration begins, bringing common law to America.
1628	English Petition of Right reaffirms common-law first principles.
1642–1649	English Civil War; civil-law monarch Charles I. deposed.
1643	Rutherford's *Lex Rex* argues from Scripture for common-law principles and government.
1649–1660	Puritans establish English Commonwealth under common law.
1660	Limited monarchy restored with Charles's promise to

	observe common-law restraints on government.
1679	Habeas Corpus Act reaffirms common-law protections.
1688–1689	Glorious Revolution: William & Mary reign by invitation and at Parliament's advice and consent.
1689	English Bill of Rights affirms Magna Carta and English Petition of Rights.
1698	Sidney's *Discourses* published, refuting civil-law absolutism and the divine-right-of-kings theory.
1707	Kingdom of Great Britain united under Queen Anne.
1731	Common-law courts fully shift written pleadings from Law French to English.
1758	Blackstone delivers first lectures on common law at Oxford.
1761	American lawyer James Otis argues against the Writs of Assistance as contrary to common law.
1765	Blackstone's *Commentaries* on the common law first published.
1787[2048]	American Constitution further articulates and confirms common-law government.
1791	United States Bill of Rights ratified, affirming common-law rights.
2004	U.S. Supreme Court in *Blakely* appeals to common law to reaffirm common-law right to trial by jury.

8
Moses' Ten Matters

Moses neither calls the ten standards he brought down from Sinai commands nor forms these into commands using the Hebrew imperative.[2049] Instead, he presents them as measuring sticks for God's

[2048] The Framers finished drafting our Constitution in 1787, but fixed 4 March 1789 as the date for our government to begin working under it. During the nineteenth century, Americans called it the Constitution of 1789. For reasons unknown to the writer, Americans now call the Constitution by the date of its drafting: the Constitution of 1787.

[2049] Moses does not call the standards delivered at Sinai commands but, rather, the ten *matters* or "words": הדברים (*ha-davarim*: matters, words, or things) as used in *Exodus* 20:1. The emphatic Hebrew construction את כל הדברים האלה (*hath col ha-davarim ha-eileh*: by the letters, "the entirety of *the* words, *the these*") and the kindred formula introducing the book of *Deuteronomy*, are in keeping with other second-millennium B.C. treaties between landlords and their vassals (tenants). Thus, the standard given at Sinai is a treaty and not a legal code: the ten matters or *words* are part of a covenant renewal document between the God of creation and His beloved people. By its articular construction, the afore-mentioned Hebrew phrase is genitive (these words and no others); by its position, it is accusative (these words and no more). Thus, God meant *Deuteronomy* to be a complete statement of His relationship with Israel, for His purposes at that time.

Deuteronomy's introductory formula is further noteworthy for two reasons. *First*, it indicates that God's covenant relationship with His people is akin to the common-law principle *diffidatio*, the breach of which was the basis of the American Colonies' grievance

people to gauge their behavior, so that each person can determine whether his doings are in keeping with his identity, and if not, he can adjust his behavior and aspire toward (follow) the way pointed out.

Scripture uses the Hebrew term (*dabarim*)[2050] to signify the Ten *Commandments*. In other contexts, *dabarim* is translated *subjects*, *matters*, *topics*, *concerns*, and even *plagues*—the comparative Latin term being *re*. Though known as commandments, the Hebrew text puts only the Fifth of the Ten Commandments (concerning honoring of parents) in the Hebrew imperative form. Moses distinguishes the remaining nine by fashioning them in grammatical forms of less-commanding tones.[2051]

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with the English Parliament and Crown: the Mother country had broken faith with the Colonies by breaching her promises (covenants and agreements recorded in the colonial charters). See generally 4.1.6 of this book (discussing *diffidatio* as respects the American War of Independence). *Second*, God's introduction of His ten fundamental standards of behavior with this covenant formula—especially coupled with what follows—demonstrates the deep personal character of God's law. Although certain aspects are conditional, other aspects are unconditional: i.e., God expresses some of His undertakings as naked promises unsupported by consideration, requiring nothing in reciprocation. The God who cannot lie makes such vows out of selfless love. *See Hebrews* 6:18. In God's economy, law has right meaning only in the context of a relationship. Absent a relationship between parties, rights and responsibilities (law) are neither necessary nor do they exist in contemplation of law.

[2050] *Dabarim* (דברים) signifies words, matters, or things, but not strictly commands. Consonant with the non-imperial tone of this term, Christ refers to the ten standards of *Exodus* 20:3–17 with *εντολη* (*entolay*). *See, e.g., Matthew* 22:38, 40. Although *entolay* is often translated "command," it stands in contrast to *παραγγλω* (*parangello*), the Greeks' term of imperial command. *Entolay* is less harsh, denoting a moral principle that encourages understanding, as opposed to a command one must obey regardless of its rightness. The root of *entolay*, *τελλω* (*tellow*), signifies the infusing of an inward, subjective inspiration that motivates to obedience; while *parangello* signifies an outward, objective demand that threatens to punish disobedience. Both terms are precise, but deliver different ideas. For example, Paul uses both in the same sentence, commanding (*parangello*) Timothy to "keep the commandment (*entolen*) unstained . . . ." 1 *Timothy* 6:14. Thus, Paul "insisted upon" (*parangello*) wise application of the idea (*entolay*); and to be wisely applied, the idea must have first been pondered. *See generally* 1 INTERNATIONAL DICTIONARY OF NEW TESTAMENT THEOLOGY, *Command, Order* 331–41 (Colin Brown ed., n.trans., 1971), *originally published* in German under the title THEOLOGIS BEGRIFFSLEXIKON ZUM NEUEN TESTAMENT (1965) (discussing these two Greek terms and the usage of each over the centuries, both in and out of Scripture).

[2051] Gustav Radbruch states, "It is as sinister as it is unreal to see the power of law exclusively in its threatening voice of command, or even only in the sanction, in the compulsion by which it enforces its command." 3 L.Q. REV. 534, *quoted in* WU, *supra* note 39, at 36. The Ten Commandments are also harmonious with all of Scripture as God's written *Torah*. "By many literary devices," says Hebraist Richard Rigsby, "Scripture provides standards of law toward which to aspire; only approximately fifteen percent of the Bible is in the imperative [command] mode." The greatest portion of the Hebrew Scriptures is devoted to history meant foremost to inform God's people of two truths forming two sides of the same coin of God's relationship to His people: who they are relative to their God and God's faithfulness to them.

Increased understanding the author's intent of even those portions of Scripture that are not strictly history—such as the poetic and prophetic books—requires knowledge of their historical context. Therefore, in order for God's people, individually or as a nation, to know and understand the way God has pointed out for them to follow (the LORD's *Torah*), they must understand their origins as a people and God's preservation of them through time—in

Paul the apostle, after quoting Moses' Fifth Command, "Honor your father and mother," follows hard with commentary, "which is *foremost* [*προτη* (*protei*): denoting that which is chief in form and dignity; Latin *primus*] *a commandment* with [attended by] a promise."[2052] Therefore, the Fifth Commandment rightly translates as a command: "*Honor* your father and your mother . . ."

Reliable English versions translate the remaining nine "commandments" as indicatives of obligation, but still falling short of commands: "You shall not . . ." (indicative), as distinguished from, "Do not . . ." (imperative). The Holy Spirit, by fashioning only the Fifth of the Ten in the imperative form, stresses that its promise is conditional: in order to experience long life in the land that God has given, one must honor one's father and mother. In short, obedience to this command is the necessary predicate to long physical life. The other nine, although not strictly commands, are, nonetheless divine standards obligatory upon all to aspire toward; moreover, to convict all of sin for transgression of these standards.

Though relaxed speech in recent decades has obscured the distinction between *will* and *shall*, accurate translations use the second person "you"

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a word, their *history*. When God's people fall into a crisis, they instinctively turn their eyes toward their origins and look there for a reminder from whence they have come (their identity), for a sign to direct their course of action and a standard toward which to aspire.

[2052] *Ephesians* 6:2. God's fulfillment of the promise of long life is contingent upon obedience to God's *command* to honor one's father and mother. Paul the apostle distinguishes the imperative concerning honoring of one's father and mother from the milder verb forms of the Decalogue meant to express one's desire or will. The Hebrews distinguished with precision the shades of the strength of their terms:

> Old Testament Hebrew writers were accustomed to express laws, commands, etc., in four ways:
>
> 1. By the regular imperative, e.g., "*Speak* unto the people."
> 2. By the infinitive, "Every male of you *is to be* circumcised."
> 3. By the (so-called) future, "*Let* there be light;" "Thou *shalt* do no murder;" "Six days is work done."
> 4. By the past tense, "Speak unto the sons of Israel," and "*thou hast said* unto them."
>
> There can be no good reason why these several peculiarities should not be exhibited in the translation of the Bible, or that they should be confounded . . . In common life among ourselves, these forms of expression are frequently used for imperatives, e.g., "Go and do this," "This is to be done first,"—"You shall go,"—"You go and finish it." There are few languages which afford such opportunities of a literal and idiomatic rendering of the Sacred Scriptures as the English . . .

YOUNG'S LITERAL TRANSLATION OF THE HOLY BIBLE VIII–IX (Robert Young trans., Greater Truth Pub. 2004) (1862) (emphasis in original). Associated with the Free Church, Robert Young was a self-educated Orientalist of broad learning and meticulous mind.

with "shall" in nine of Moses' ten standards to stress the distinction between the redeemed and the unredeemed. The new creature, begotten from above with a new identity and delivered from bondage to sin, *shall never* produce sin. The source of sin is, rather, the old identity, having left its mark in the flesh. Even though the new Christian is a new person with a new nature that responds to his new Master the Holy Spirit, his flesh remains untrained to perfectly follow his new nature. Conditioned to the cravings of the old deposed commander, the flesh tends to obey the cravings of the flesh. Even though the power of the flesh is broken, the echo of its commands remains in one's ears.

Though pursuit of the standards of the Decalogue is obligatory upon all men, the Christian's obedience to these standards is never a condition of God's acceptance, but rather, is the Christian's confirmation that God has already accepted him. Indeed, only God's acceptance (grace) enables one to persist in following God's standards. The Christian's observation of God working through him by producing the fruit of obedience bolsters his confidence in his standing with God; thus, his faith grows. God's acceptance is because of His graciousness, never because of our obedience; further, obedience to the Ten Commandments is never the cause of salvation, but the evidence that salvation has occurred. In short, the obedience of faith is the result, not a cause of salvation.

Thus, John the apostle states: "The one begotten out of God *does not* [not "should not"] do sin because His seed abides in him, and he is unable to sin because he is begotten out of God."[2053] The one born from above is to bring his behavior into conformity with the standards of God by the new power of his *new identity*. Only the Christian is empowered to this task because what he *was* no longer must control, the bonds of old power is broken: he is a new creation. The Scripture's forensic reality of the believer's new identity, says James Christian, was the gospel's great and profound attraction during the early centuries following the resurrection of Christ; it remains so today.

[2053] 1 *John* 5:18. However, 1 *John* 1:10 and 3:9 each unambiguously state that the Christian has sin. Nonetheless, these Scriptures are consistent: sin dwells in the Christian's members, i.e., his physical body (Paul calls it "this body of death"); but by the new birth, God has begotten the Christian as a new creature with a new mind and a new identity. This new identity is not the source of his sin. Paul the apostle distinguishes between his mind and his body: with his mind, he serves the law of God (*see Romans* 7:25) by striving to subject every thought to Christ (*see* 2 *Corinthians* 10:4–5); his body he presents as a living sacrifice, by striving to bring it under subjection. *See Romans* 12:1, 8:13; 1 *Corinthians* 9:27.

9
Wigamores:
English Puritans & Scottish Covenanters

The English Monarchists of the seventeenth century were those devoted to the civil law's divine-right-of-kings doctrine. Those in England opposed to the divine-right-of-kings doctrine, were called *Protestant*s[2054] or, more often "Puritans"; those in Scotland, were called *Covenanters*.[2055] The Monarchists, seeing the doctrinal and political commonness of their political opponents, the English Puritans and the Scottish Presbyterians, called both groups *Whigs*. The term *Whig* persisted into the United States as the name of an early nineteenth-century political party formed in 1834, until the newly formed Republican Party, built from the ranks of Whigs and other parties, overshadowed the American Whig Party, ending it. Three well-known American Whigs were congressmen David Crockett, Abraham Lincoln, and Henry Clay. The origin of the term "Whig" adds color to its early understanding and use.

During the seventeenth century, Scottish horse thieves and cattle rustlers—the Scots calling them *reivers*[2056]—operated on the English-Scottish border much as Geronimo, the redoubtable Apache renegade, operated on the Arizona-Mexican border. As did Geronimo, Scottish reivers plied their thievery in either jurisdiction and peddled their ill-gotten livestock in the other. The English of the counties palatine[2057]

[2054] The name *Protestant* attached to those in dissent against Roman power. When "[a]t the Diet of Speyer in 1529, princes favorable to the Reformation delivered a 'Protest' against the proceedings of the emperor and their Catholic peers—and thereafter all such dissidents were known as "'Protestants.'" BENSON BROBRICK, WIDE AS THE WATERS 155 (2002).

[2055] The *Covenanters* were presbyterian, and thus, opposed the total state:

> A name applied particularly to Scottish Presbyterians who signed the National Covenant of 1638 and the Solemn League and Covenant of 1643 . . . George Gillespie and Samuel Rutherford were contemporary Scottish writers who opposed the theory of Divine Right of Kings, holding that limitless sovereignty pertains to God alone.

See J.D. DOUGLAS, DICTIONARY OF THE CHRISTIAN CHURCH 267 (J.D. Douglas ed., 1978). *Nehemiah* 9:36–10:9 provides biblical precedent for the Covenanter's commitment. The Covenanters were those willing to additionally bind themselves to one another concerning the duty that God had already revealed to them.

[2056] *Reiver* is the agency form the old English verb "reave," from a root meaning "to rob"; the intense form of the verb is "bereave," i.e., to tear away in violence.

[2057] In England, there were three *counties palatine* on the Scottish and Welsh borders: Chester, Durham, and Lancaster. Durham County (in the east) and Lancaster County (in the west) were on the Scottish border; Chester County lay just south of Lancaster County on the Welsh border. From the days of the Roman occupation in the first century, only the hardiest occupied these hostile regions. From the days of the Norman Conquest, the nobility in these counties enjoyed prerogatives of the sovereign, enabling them to deal swiftly and decisively with invasion and crime. In a word, the lords of the counties palatine

along the Scottish border called these renegades *Whigs*, in abbreviated imitation of the Scottish teamster's cry *whiga-more*, meaning *gettiup-mare*. "Whig" was a term of derision.

The name Whig reminded the English of two hated groups combined into one: cattle-rustling horse thieves and Scots. Because the term *Whig* conveyed a negative connotation to the English mind, and because the English Puritans shared the theological and political view of the Scottish Covenanters, the Monarchist party also hanged the name "Whig" on their English Puritan opponents, intending to demean the Puritans in the eyes of the English through guilt by association with the hated Scots. Since the Puritans were religiously and politically aligned with the Covenanters (Reformed Scots); and since, in the minds of the English, Scots were by nature horse thieves (*Whigs*)—so argued the Monarchists—, then the Puritans, being aligned with *Whigs*, were of the same ilk as Scottish horse thieves. Put another way, to the English Monarchists, all Scots were *Whigs* (horse thieves and cattle rustlers); therefore, any Puritan aligned with the Scots was a *Whig* also. Albeit a stretch for a guilty connection, such so-called guilt by association remains typical of politics—and close akin with the civil-law crime of conspiracy.

Though now forgotten, the best known of these Whigs to the Founders of America was Algernon Sidney. Thomas Jefferson called Sidney's *Discourses Concerning Government* the best text for learning the first principles of American government. While president of the University of Virginia, Jefferson insisted that Sidney's *Discourses* be required reading for all students. By the time, however, he and John Adams reconciled as friends in their old age, it was hard to find Sidney's *Discourses* in circulation. In 1823, writing to Jefferson, Adams lamented that Americans had forgotten Sidney:

> I have lately undertaken to read Algernon Sidney on government . . . As often as I have read it, and fumbled it over, it now excites fresh admiration [viz., wonder] that this work has excited so little interest in the literary world . . . for the proof it brings of the bitter sufferings of the advocates of liberty . . . to this time . . . .[2058]

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operated as though from the *palace* of the King of England—*palatine* being from the Norman French: joining the suffix *–ine* (having the nature of) to *palat* (palace). For example, the courts of the counties palatine recited indictments as offences against the Peace of the local lord rather than against the King's Peace; each of these separate lords also held by right the power to pardon felons. *See* 1 BLACKSTONE, *supra* note 12, at 113. The Courts Act of 1971 abolished the final vestiges of the rights of the lords of the counties palatine. *See* BLACK'S LAW DICTIONARY 355 (7th ed. 1999).

[2058] *Quoted in* SIDNEY, *supra* note 451, at XV (bracketed words in original). In kindred spirit with Wyclif, Sidney insisted that Providence granted authority according to one's

Sidney came from the counties palatine along the Scottish border; though neither a Scot nor a horse thief, His loyalty to the Protestant cause identified him as a Whig. Sidney, at the battle of Marston Moor, distinguished himself,[2059] suffering many severe wounds, and later distinguished himself as a student of political history. On 7 December 1683, at the decree of the cruel Justice George Jeffreys, the Crown beheaded Sidney. His trial was a procedural sham: the court ignored common-law protections in favor of expediency and civil-law absolutism. The Crown obtained Sidney's conviction based on pages of the unfinished manuscript of his book *Discourses*. The Court allowed the pages into evidence, though seized during a warrantless search of his home.

As to Justice Jeffreys (1648–1689), "What goes 'round comes 'round." After living high and wide for a few years as a cruel judicial vindicator of cæsaropapist doctrines in England—by his decrees some two hundred were executed and hundreds of others sold into slavery in English Colonies—Judge Jefferies perished in the Tower Prison. Macaulay saw in Justice Jefferies "the most odious vice which is incident to human nature, a delight in misery merely as misery." *Misery for misery's sake* is Christ's meaning of evil in His Sermon on the Mount. When one discerns such evil in one's accuser, Christ admonishes to never square off with him—especially before Rome's civil-law tribunals—in an attempt to exact revenge.[2060]

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obedience to the truth of God's Word. Thus, to disobey truth is to act outside of (without) authority. Sidney differed with Wyclif and John Locke, however, insisting upon a natural inequality among men. For Sidney, man's obedience to truth arises naturally (i.e., from his non-spiritual nature) from some, but not from others. *See* 1 FREDERIC WILLIAM MAITLAND, *Liberty*, *in* THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 17 (1911). Sidney's position on this point appears contrary to *Romans* 2:14–15. See generally § 5.1.2 of this book (discussing, in light of *Romans* 2:14–15, every person's God-given ability to discern right from wrong).

From 1805 to 1990, only one major reprint of Sidney's *Discourses* appeared. The writer has found only one copy printed before 1990, located in the rare-book room at a Midwest university and printed in 1698—fifteen years after Sidney's martyrdom—on pages two-feet long by one-foot wide: likely a copy of the first edition ever published. In recent years, Liberty Fund, Inc. of Indianapolis, Indiana, has published Sidney's *Discourses Concerning Government*.

[2059] In July of 1644, the parliamentarians routed the Royalist forces at Marston Moor in Yorkshire.

[2060] *See Matthew* 5:39. In this passage Christ instructs, "Do not *stand face to face* [*αντιστηναι: antistaynai*] with the evil one [*τω πονηρω: tow ponarow*]." Put another way, do not square off with your accuser before a civil-law tribunal that will ignore the majesty of eternal law and due process. Before such a tribunal, one forfeits fair play; truth will be suppressed in unrighteousness. The context refers to *lex talionas*: the law of retribution. *Ponarow* denotes inborn radical evil: "They that cannot sleep unless they have accomplished mischief." RICHARD CHENEVIX TRENCH, SYNONYMS OF THE NEW TESTAMENT 316 (photo. reprint 1953) (1880). Such evil men delight in misery: not being content to perish in their own corruption, these must draw others into the same destruction as

10
Islamic Law:
Fundamentally Babylonian

Islam is fundamentally Babylonian in two respects: it fails to recognize the flawed condition of human reason; it demands one's obedience to the impersonal will of the powerful, instead of one's obedience to responsibilities arising from personal relationships. Because Islam's god is impersonal and without mercy, forced obedience to his will is the all-consuming mania of Islam. *Islam* means absolute submission. Thus, the symbol of Islam is the sword, an instrument used to force one's will upon another. From its beginning, by acts of terror calculated to induce fear, Islam has sought to dominate. Islam is a culture of religious fever fueled by impersonal zeal for undiscerning application of arbitrary religious scruples, as opposed to one's obedience in response to God's love. Because the god of Islam is impersonal, he is never "Father." Islam seeks to enforce the *will* of the few through fear; by contrast, Christianity is divine truth realized through divine love.

Through the centuries, the ever-zealous sword of Islam has been due to its devotees' common devotion to kill all refusing to join their pagan fawning.[2061] For centuries, the hatred of Islam toward all those declining to join their hatred has welded Islamic unity.[2062] Moreover, because Islam pursues its goals by sanctioning vengeance, Islam draws under the banner of its cause those of violent lust.

Beyond depending upon wearying and unrestrained aggression to keep unity, Islam, in addition, has labored to compile writings that appeal—as a common impelling standard—to the less-vengeful elements of their religion. Thus, Islam has gathered from among its nations' two oral collections of Islamic custom called *sunna*: *al-Bukhani* (collected

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themselves. *See Proverbs* 4:16. Christ, however, admonishes a man to be wise as is a serpent and harmless as is a dove. See generally app. 18 of this book (further expositing this principle as it relates to the Christian's responsibility toward government).

[2061] Islam recognizes two levels of devotion: those that accept the faith of Islam and those that reject the faith of Islam but are willing to pay the Islamic tax (*zaket*). For example, the Islamic state deems Christians and Jews that pay the *zaket* tax subjects of the state and, thus, entitled to the Muslim believers' exemption from the penalty of murder for killing an apostate from Islam. *See* NUH HA MIM KELLER, RELIANCE OF THE TRAVELER 583–84 (1994).

[2062] *Unity* enables the power of Babylonian religion, law, and government. The power of evil depends upon false religion, from which arises false law and government. Moreover, false religion achieves unity through imperial law and government of a single human will. Once such a system is established, it will achieve the ambition of its leader, unless God intervenes. *See, e.g., Genesis* 11: 6–9 (providing the first recorded instance of such intervention). See in addition app. 3, for discussion of אחד (*'echadth*), the Hebrew term for unity and integrity).

A.D. 810–870) and *Muslim* (collected *circa* A.D. 817–875). Further, Islam has compiled the written records of these oral traditions in writings called *hadiths*.[2063] Then, in an effort to persuade others that these collections are from unbroken, authentic, and therefore, dependable and authoritative sources, Islam has gathered chains of witnesses spanning centuries called *isn'ad*.

Lastly, in an attempt to provide respectability for these written *hodgepodges*—a term of legal art for collections of particular laws that are inconsistent between each other—, Islam has established law schools called *madhabs*. These schools have chosen certain elite men alone deemed qualified to exercise reason (*sha'fi*) and to hold the exclusive right of interpretation and application of these collections of writings (*hadiths*) to all of mankind in judgment. As Greek scholasticism, Islam separates human reason from all other aspects of personhood and elevates above Scripture those deemed worthy to exercise it.

As the civil lawyers hold *Corpus Juris Civilis*, the *sha'fi* understand the *hadiths* and the Koran as expressions of superior reason and claim the exclusive right to wring out any apparent gaps and omissions by their further sanctified extrapolations of logic. Nevertheless, Islam in general, and those Islam qualifies to exercise reason (the *sha'fi*) in particular, agree that once the community as a whole is agreed on any matter, that consensus is the law. Islam recognizes, therefore, as its court of last resort, the collective opinion of *the people* (without definition) as final arbiters of right and wrong.[2064] Thus, Islam and the civil-law tradition are akin in their fundamental veneration of human reason and recognition of an academic priestcraft to control popular thought. The leading influences in both traditions are those persons that each tradition considers its scholars, whose reason the faithful blindly accept without testing its conclusions against their common sense of creation and experience, as these are consonant with God's Word written.

During the last twenty years, the United States has waged two full-scale wars against Islamic nations and has experienced bloody scrapes aplenty with Islamic hostiles. Just over a century ago, General Blackjack Pershing's men nobly fought Islamic deceit and savagery on the southern Philippine Island of Mindanao. About two centuries ago, American

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[2063] These *hadiths* are kindred to the Babylonian Talmud of the Jews in that both are oral traditions recorded. The Talmud, as these *hadiths* and Justinian's *Corpus Juris Civilis*, is venerated "as a holy work, an infallible textbook . . . ." MILTON S. TERRY, BIBLICAL HERMENEUTICS: A TREATISE ON THE INTERPRETATION OF THE OLD AND NEW TESTAMENTS 614 (photo. reprint, n.d.) (1898).

[2064] "[P]opular choice, said Kuyper, "gains the day, as a matter of choice, where no other rule exists, or where the existing rule falls away." ROBERT DUNCAN CULVER, TOWARD A BIBLICAL VIEW OF CIVIL GOVERNMENT 52 (1974), *quoting* ABRAHAM KUYPER, LECTURES ON CALVINISM 84 (1961).

sailors under the leadership of Admiral Steven Decatur destroyed the fleet of Islamic Barbary pirates of the Ottoman Empire's North African regencies of Algiers, Tripoli, and Tunis, known collectively as the Barbary States. Nearly eight centuries ago, Magna Carta arose out of the two-fold threat of Roman law and the Islamic sultan of Morocco's collusion with King John to overtake England. Such experiences teach us that Islam follows its living and dead prophets as gods.[2065]

Islam's concept of law is Babylonian in that its controlling characteristic is the single will of a leader or of the community, rather than one's independent and individual responsibility demanded by one's *relationships*. For a Moslem, it is enough to know that Muhammad *wills* it or that a feverish community backs their leader's perception of Muhammad's will. To sum up, Islam is a government of men, not a government of law. Furthermore—as is well known nowadays—, Islam is a government of men controlled by violent passions, who appeal to those same passions in others to hold their domination over others.[2066]

11
Holiness:
The Art of Drawing Distinctions

God desires that His people draw ever-finer distinctions concerning when and under what circumstances a certain thing is acceptable to God, or when and under what circumstances it is unacceptable. For example,

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[2065] These struggles against Islam—as are those of today—were against savage elements. Those witnessing the Balangiga mutilations of Americans on the southern Philippine Island of Samar compared these to the mutilations during and after the Battle of the Little Big Horn. General Pershing's campaign against the Islamic Moros of Mindanao renewed American understanding of Islam brutality. American soldiers found the standard .38-caliber Long Colt revolver unfitting for the rigors of warfare with the Moros because it lacked stopping power. As did the earlier Islamic assassins (Arabic, *hashshashin*: abusers of hashish), the Moros used drugs to dull their natural sense of mercy toward others and their own pain. In addition, they wore bamboo armor underlain with cloth wrapped thick and tight about their bodies, arms, and legs. Consequently, during the Moros's frenzied attacks, the .38-caliber round seldom penetrated their makeshift armor; even if one did, it merely checked the suicidal attack of the drugged swordsman. The knockdown power of the heavier, slower .45-caliber Colt automatic round, however, stopped the charging Moro, saving American lives and limbs.

[2066] See generally ALBERT HOURANI, THE HISTORY OF THE ARAB PEOPLE 66–68 (1991), for much of the information in this app. 10. Islam and Judaism introduced in the West the Greek writings that provided the scholastic foundation of modern civil law and government: human reason used to vindicate the will of the state. The Arabic philosopher Averoos produced translations of Aristotle that entered Europe through Spain; the famous Jewish rabbi Moses Maimonides produced translations that appeared in Paris. EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES 251–52 (1979). *See generally* HOLY QUR'RAN (Abdullah Yusuf Ali trans. & comment'r, 2005) (providing an Arabic text, an English translation, and modern commentary). See also generally NUH HA MIM KELLER, RELIANCE OF THE TRAVELER (1994), for a classic manual of Islamic sacred law.

some acts, such as idolatry, God never accepts under any circumstances; others, such as homicide, God's law allows only within well-defined contexts of self-defense and warfare. God distinguishes between that which is acceptable to Him, calling it *holy* (*ka-dthosh*),[2067] and that which is unacceptable, calling it *unholy* (*coal*).[2068]

Leviticus 10:10a states God's desire for His people: "[T]hat you distinguish[2069] between the holy [*kadthosh*] and the unholy [*coal*]." Scripture then provides examples of those things that are holy and calls God's people to distinguish between themselves and the rest of humanity by honing their mental and spiritual ability to closely discern good (holy) from evil (unholy) and to live according to the good. To set one's self apart to the discipline of godly discernment differentiates one from this present world. Because God has distinguished His people from all others, setting them apart for His own, they are to also learn and observe the distinctions between themselves and all others. Thus says God, "you be holy." God's people are to set themselves apart from those under control of Satan's domain by becoming loyal and habitual practitioners of godly discernment.[2070]

Satan obscures the distinctions God desires His people to make. In Satan's ambition to bend our thinking to undiscerning political correctness, he floods our surroundings with lies that deny not only the differences between good and evil, but even the complimentary beauty of God's created distinctions.[2071] For example, Satan teaches that men and women need never distinguish between right and wrong, that one fellow's idea is just as valid as another's, that all religions are the same, that all gods are the same, that Plato and Confucius are on the same level as Jesus Christ, that geological processes have always been as gradual as they are now, that all legal traditions are the same, and that men and women are interchangeable in inclination and role.

God, however, instructs His people to remain sober so that they will discern and maintain the distinctions that please God, i.e., according to

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[2067] Hebrew: קדוש.

[2068] Hebrew: חל.

[2069] להבדיל (*laha-va-deal*) is the Hiphil or causative stem of בדל prefixed with the preposition ל (*lamedth*): "to cause a distinction to be made" or as the Authorized Version has it, "you put the difference."

[2070] *See generally* WINTERS, *supra* note 39, at ch. III, § 3 (providing an exegesis of the Hebrew verb for "whet" [שנן: *shanan*], as used in *Deuteronomy* 6:7). *See id.* at ch. VI (expositing the laws of learning as set forth by Paul the apostle *in* 1 *Timothy* 2:15).

[2071] Civil and administrative law is suited to uniformity and machine-like precision aimed at efficiency and not respect of the distinctions of individual relationships and associations. For this reason, civil-law ideals work well in military and maritime contexts, where instant obedience to a single will and command is necessary.

His Word.[2072] Practicing the discipline of "holiness" remedies dangerous uniformity with this present world. The biblical worldview is an inclination of mind that rejoices in the ongoing privilege of drawing distinctions consonant with Scripture; to do so is to think God's thoughts after Him.

Kadthosh, the Old Testament Hebrew term for "holiness," denotes any object distinguished from others and set aside for any reason, whether proper or an improper, right or wrong. Thus, the term's meaning is context dependent. For example, ancient writers sometimes used *kadthosh* to denote those set apart as prostitutes and priests to the pagan deity Astarte; at other times, those things set apart to God. Because the meaning of *kadthosh* is context dependent, God does not say only, "You be holy [*kadthosh*]," and no more. He says instead, "You shall be holy *because*[2073] I, the LORD, am holy . . . I, the LORD, am setting you apart."[2074]

God has set His people apart according to His covenants and for His purposes. Thus, to observe God's distinctions and to never follow the world's failure to observe God's distinctions is to live by the highest law. The holiness God desires for His people is the distinctions God uses to define Himself. To serve God means to set one's self apart to His service in response to God's having already done so. The comparative Latin term is *intelligere* (English "intelligence"), signifying "to choose" (*legere*) "from among" (*inter*), with the resultant meaning, "to distinguish the one from among the many, which at first glance appears indistinguishable." The practice of holiness is God's definition of *intelligence*.

Holiness is the habit of mind that discerns ever-finer distinctions between that which pleases God and that which displeases Him. It is the developed ability to discern, with increasing acuteness, the distinctions consonant with God's way pointed out in Scripture. Only the Holy Spirit's honing of the mental senses to discern good and evil, variation and contrast, which give the right meaning to facts, human relationships, and life. Moreover, the finer the distinction of contrast, the richer life becomes with meaning.

[2072] *See Leviticus* 10:9–11.

[2073] Hebrew: כִּי (*key*).

[2074] *Leviticus* 1:7; 1 *Peter* 1:16.

12
John Calvin: The Civilian

The gist of humanism is the claimed worthiness of the mind of man as the final standard against which all else is measured. From the Garden of Eden to Protagoras, Erasmus, Thomas More, John Dewey, and to the present, humanism continues to elevate human reason above Holy Writ. Humanism's prime tools are the principles of the civil law: to enshrine man's will and reason in law and government. The Word of God and the capability engraved in the desire of every person, Christian and heathen, to recognize and demand right law and government is the remedy against the civil law. Though John Calvin invoked the Word of God in shaping his ideals of law and government, he did so in an environment of thought awash in Justinian's Code.

Though trained as a humanist, John Calvin's contribution was integral not only to the Reformed Church in Scotland, England, Ulster, and America, but also to common law and government in England and America. The biblical principles that the British refugees—including their leaders John Knox and Christopher Goodwin, and men such as Thomas Cartwright—carried back to Britain from their exile in Geneva during Calvin's influence there, brought presbyterian ideals of church government to the forefront of British thought. Because presbyterian government tends toward dispersion of authority, power, and reciprocal checks and balances, it strengthened in the English mind the common-law tradition of separate and limited powers of government. Moreover, pursuit of these ideals quickened some to migrate to America, where presbyterian principles fortified common-law government in the several budding American States and in their federal government.

John Calvin's dealings with the common-law tradition, however, was little if at all. Calvin's training as a civilian (civil lawyer) enhanced his capabilities of analysis in certain respects, but hampered his conclusions concerning applied law and government in other respects. In Calvin's day—as today—universities were the seminaries of humanism, never foremost focused on finding truth, but rather meant to justify, through human reason, the spirit of the times and *the powers that be*: the *status quo* or state. Thus, the compounded powers of imperial church and state fashioned university education to conform the student's mind to the civil-law ideal: the will of the legislator justified by the reason of the scholar constituted final authority in all academic disciplines. "As a young humanist author of the commentary on Seneca's *De Clementia*," writes Douglas F. Kelly, "he [Calvin] followed the old Roman jurists . . . holding

that the ruler was not bound by the law . . . since he [the ruler] is the living law: *lex animata*."[2075] "Throughout his [Calvin's] essay on civil government," writes Ford Lewis Battles, "there are strong echoes of the Seneca commentary."[2076] Thirty years later, however, Calvin acknowledged that for all the civil law's veneration of logic, it demands that the will of the prince is final, trumping all:

> '[W]hat matters is will not reason.' In other words they consider themselves bound by no laws . . . Well, that old saying is utterly arrogant (to go by will instead of reason), but nevertheless it is the accepted procedure in the Institutes [of Justinian] of the Roman Empire.[2077]

[2075] DOUGLAS F. KELLY, THE EMERGENCE OF LIBERTY IN THE MODERN WORLD: THE INFLUENCE OF CALVIN ON FIVE GOVERNMENTS FROM THE 16TH THROUGH THE 18TH CENTURIES 28 (1992).

While the civil law calls the ruler the living law, the Word of God declares Christ the Living Word: the first is a falsehood; the second is truth. John the apostle writes that Christ, being in the bosom of the Father, has "declared Him [the Father]"; Wyclif has: "He [Christ] hath told out." *John* 1:18. Christ has made visible and known the character of God the Father; He is at once the revelator and the revelation of God's Word. Christ never redeems a person because he obeys God's law; rather, Christ redeems the individual in order to empower him to obey.

[2076] FORD LEWIS BATTLES, INTERPRETING JOHN CALVIN 115 (Robert Bednedetto ed., 1996).

[2077] JOHN CALVIN, *Sermon XXIX on I Samuel*, *in* CALVIN STUDIES COLLOQUIM 66 (Douglas F. Kelly trans., n.p., n.d.) (emphasis added), *quoted in* DOUGLAS F. KELLY, THE EMERGENCE OF LIBERTY IN THE MODERN WORLD: THE INFLUENCE OF CALVIN ON FIVE GOVERNMENTS FROM THE 16TH THROUGH THE 18TH CENTURIES (1992), at 29.

However, to go by reason alone instead of the legislator's will is also error. In the civil-law tradition, reason arises from the state to justify the will of the state. "Whatsoever pleases the sovereign has the force of law." THOMAS AQUINAS, TREATISE ON LAW, Questions 90–97, *of* SUMMA THEOLOGICA 2 (n.d.). "Now the rule and measure of human acts is reason . . . ." *Id.* at 3. By these statements, Aquinas makes clear the foundation and dogma of civil and canon law: Adam (mankind), by falling into sin, never tainted his mind and reason and, therefore says Aquinas, these remain trustworthy. Thus, the will of the state amounts to law; human reason, then, arises from the will of the state, and is valid only as it justifies the will of the state. "Reason has its power," said Aquinas, "in moving from the will . . . in this sense the will of the sovereign has the force of law . . . ."*Id.* at 4.

For the civilian, will and reason compliment each other as do bread and butter; together, these two are the indispensable elements of the civil law, emphasizing foremost the ruler's will (the will of the state), followed by human reason as a tool to justify that will. State power, followed by logic's justification, was also the assertion of Nietzsche by his enduring image of the *übermensch*: "over-man," or *superman*, who transforms his will into raw power. Nietzsche's thought, however, was nothing new, but was old Babylonian doctrine that had been the foundation of the civil law and Justinian's Code for centuries—Nazi Germany fell to its seduction.

To be valid, however, reason must proceed from and rest upon the authority of the Word of God. For example, Paul the apostle's teaching was valid only as he reasoned *from See Acts* 17:2. *From* (*απο*: *apo*), signifying, in this instance, the contact point of beginning from which reasoning begins: the Scriptures, the point of contact for building solid understanding.

Trained as a civilian, in practice Calvin stressed reason in the administration of law and government. Common law, on the other hand, stresses foremost facts and relationships, followed by analogy to precedent, and reason.[2078] In addition to generally accepted civil-law influences, by Calvin's day the scholastic tradition—fashioned and practiced in the tradition of Aristotle—had become the inextricable handmaiden to Justinian's *Corpus Juris Civilis*, entangled together, forming the academic basis of Rome's university system. Between 1558 and 1563, at Calvin's behest and in imitation of Rome's monolithic law and government, Geneva organized a system of education built upon the university model: designed to justify and preserve a single law and

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The common-law tradition encourages the spontaneous participation of everyone in a country, keeping tyrants from gaining control:

> Tyrants can only get a hold of a central system where the rules issue from a single legislative authority (government); tyrants cannot get control of a tradition that depends on the spontaneous participation of each and all of the inhabitants of a country in the process of law discovery and articulation: viz., a common-law tradition.

Peter Landry, *The Common Law: Tradition & Stare Decisis* (visited 21 Nov. 2005) <www.blupete.com>. The common-law tradition is the process whereby courts discover the rule meant to govern a particular relationship, in the context of a particular circumstance. By contrast, the civil-law tradition aims at achieving the will of the state, which is touted to be reason.

[2078] In God's design, human relationships in right order demand exercise of mutual respect and observance of authority: authority precedes will and reason. For example, the individual's relationship with God the Father begins with acknowledgement of His authority—*e.g.*, "Your kingdom [*βασελια: baselia*, authority] come," followed by an understanding of His will ("your *will* be done"). *See Matthew* 6:10. By contrast, in the civil-law tradition, one's relationship with the state begins with a recognition of state power, followed by bowing to state will: the will of the ruler precedes reason. "Reason," writes Aquinas, "has its power in moving *from* the will." THOMAS AQUINAS, TREATISE ON LAW, Questions 90–97, *of* SUMMA THEOLOGICA 4 (n.d.) (emphasis added). By contrast, Scripture teaches that reason has its power by moving one's will—a difference with a distinction.

The common-law tradition begins with respect for the authority of the law; the civil-law tradition begins with respect for the power of the state. The civil-law state reposes upon power; the common-law tradition reposes upon authority. Thus, for example, the civil-law state appeals to the threat of its power: "Who is the god," threatened the emperor of Babylon, "that shall deliver you out of *my* hands?" (*Daniel* 3:15); whereas the common-law ideal appeals to authority, and therefore, inculcates a nobler mind: "[The Bereans] were nobler . . . in that they . . . examined [*ανακρινοντες* (*anakrinontes*): as in legal processes, to repeatedly sift in careful and exact research] the Scriptures daily, whether those things were so." *Acts* 17:11. *See* 2 A.T. ROBERTSON, WORD PICTURES IN THE NEW TESTAMENT (1930).

In holding authority (right) above power, the common-law courts respect the *writ quo warranto* (requiring that government justify its exercise of power with duly-derived authority) and the *writ of mandamus* (requiring that government justify its neglect to exercise power, where authority demands such exercise). See generally app. 1, sec. I of this book, for an example of a writ quo warranto issued in 1278. See generally § 5.1.2 of this book (discussing the common law's and the civil law's differing conclusions concerning the effect of Adam's fall on the will and reason of his descendants).

government for both church and state. "[W]hile the content seems to be drawn predominantly from secular literature, this was framed by Christian prayer, psalm singing, and catechesis in the lower grade, and by study of the New Testament Greek in the higher Grades . . . in short the program is typical of Christian humanism . . . ."[2079]

John Calvin, as was his father before him, was a civil lawyer and trained under some of the best-known civilians of Renaissance France. His training included methods of inquisition and the humanists' statutory construction, which venerates and interprets the text of the Code in abstraction, using grammatical and logical analysis, as opposed to including intense case-by-case consideration of facts and circumstances in the light of precedent gained through experience.[2080] Calvin had studied civil law at the University of Bourges under the accomplished humanist and civil-law scholar Andre Alciati. Both the Roman code and laws of Geneva were forms of urban—and therefore administrative—law, emphasizing the state's will over private relationships, resulting in broadly construed expediency over refined justice.

Over time, Calvin's study of the Bible led him to question the civil law's notions, but he remained without common law's leading principles in his experience to offer in their place. Calvin's rhetorical question hints at the limitations of civil-law theories, "[I]s it not possible for the people to consider measures in order to remedy the evil [of tyranny]? A difficult question indeed . . . ."[2081] As did Luther and Zwingli, Calvin lived in the

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[2079] FORD LEWIS BATTLES, INTERPRETING JOHN CALVIN 63 (Robert Bednedetto ed., 1996). The phrase *Christian humanism* is a contradiction of terms. By this phrase, Battles means that the literature of the ancient Greek humanist was a substantial part of Geneva's curriculum of education. At bottom however, humanism holds man equal to or above Christ and is, therefore, heathen.

[2080] The Word of God written being perfect, attention to its detail of vocabulary, grammar, and literary structure yields truth and freedom; such attention to human codes results in confusion and tyranny. The reformers, therefore, rightly took the grammatical and logical analysis that the schoolman applied to Rome's civil and canon law and applied it to Scripture.

[2081] JOHN CALVIN, *Sermon XXIX on I Samuel*, *in* CALVIN STUDIES COLLOQUIUM 66 (Douglas F. Kelly trans., n.p., n.d.), *quoted in* DOUGLAS F. KELLY, THE EMERGENCE OF LIBERTY IN THE MODERN WORLD: THE INFLUENCE OF CALVIN ON FIVE GOVERNMENTS FROM THE 16TH THROUGH THE 18TH CENTURIES (1992), at 29. According to Fratcher, since Calvin never gained enough control of church and state in Geneva to fully mold his ideal of government in them, one must look to Calvin's writings for his political ideals. For Calvin, the form of a government was not of primary importance. Huizinga, citing Calvin's statement in his *Commentary on Matthew—Tametsi enim reges potentie sue magis gaudent eamque terrori esse malunt, quam in populi consensus fundatum esse cet—*, summarizes, as far as he is able from the balance of Calvin's writings, Calvin's theory of divine sovereignty as respects government by men on earth: "The government is God's servant for the people, and therefore not under the people. Government is as far as possible by the people, but not entirely of the people: not an instrument of the popular will, though its composition should always be under the direction of the people . . . ." W.F. Fratcher,

current of the civil-law tradition from which it was difficult to fully extricate himself. Many seeking a fundamental Christian perspective concerning law and government, have looked to Calvin, whose knowledge of human expression of law and its application through government, though great, was without the experience of the common-law tradition. Although guided in particulars by a constant stream of biblical exegesis, the urban law of Geneva reflected the Roman Code in basic legislative theory and method. "Calvin ringingly asserts the 'godship' of the ruler."[2082] "[T]hey are," writes Calvin, "the vicars of God."[2083]

Absent from John Calvin's ideal of aristocratic democracy is the unshaken confidence of common lawyers such as John Fortescue, Edward Coke, John Selden, and men such as Steven Langton, John Wyclif, and Geoffrey Chaucer, in their ideals of common-law and government. At bottom, these men held steady in conviction that the common law is consonant with the Bible; further, that its principles and procedures are best calculated to aid in discovery of particular applications of scriptural principles. They remained intent and unrelenting in their mission to weave the common law into their country's religious and political life.

Likewise, John Calvin's understanding as a civilian influenced his policies for Geneva. In considering earthly government of church and state, Calvin, in certain respects, viewed Old and New Testament polity through the grid of Roman civil law. He differed, however, with Luther's, Melancthon's, and Zwingli's support of the absolute power of the state—at least in the face of revolution—by steering a middle course between a total state and a total church, each supreme under God in its own sphere.

Calvin effected few changes to the constitution of civil-law government of Geneva. Changes made tended toward aristocracy by concentration of power in the Little Council of Geneva. Contrary to the later resolutions of the Westminster Assembly,[2084] Geneva's government

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"The Government of Geneva Under John Calvin" 23 (1938) (unpublished manuscript, copy on file with author), *quoting* Huizinga, A.V. C.P., *Calvinistic View of Church and State*, 83 BIBLIOTHECA SACRA 182 (Apr. 1926)'s .

[2082] *Id.* at 207. Calvin wrote in terms and phrases familiar to him: from Justinian's civil-law Code and from Budaeus, the civilian. *See id.* at 70.

[2083] *Id.* at 207.

[2084] "God alone is Lord of the conscience, and has left it free from the doctrines and commandments of men, which are, in any thing, contrary to His Word." *Westminster Confession of Faith*, ch. 20, sec. II. Even though many, who accept God's Word as authoritative, agree that Calvin's *Institutes* are consonant with the Word of God and valuable reading, the *Institutes* are nonetheless a human expression. In order for the individual to pursue the Berean's nobler example set forth in *Acts* 17:11, all human expressions of law must remain open to unfettered discussion and comparison against God's Word. Any threat of penalty for such discussion chills the free and unfettered pursuit of the Berean's noble example, and is thus contrary to God's Word.

maintained an aggressive inquisitorial interest toward the liberties of the individual, including freedom of speech; criticism of ministers, their doctrines, or their sermons; and gourmandism. Under forced oath, members of the ruling Council were forced to criticize each other's failings. It was a high misdemeanor to require a special meeting of the general assembly of citizens. Moreover, the official doctrine in Geneva was the theology of Calvin: in 1552, Geneva's Little Council decreed that Calvin's *Institutes* "present the holy doctrine of God" and that "in the future no one shall dare to speak against that book or that doctrine." By 1555, many perceived the mind of John Calvin, and not eternal law, to be the measure of rule in Geneva. Though eventually considered the master of Geneva, Calvin's control was never enough to enable him to shape Geneva's government of church and state into the form he desired.

While history views reformers such as John Wyclif and Martin Luther as seminal thinkers and innovators, history views Calvin as a logician and systematic thinker. Grounded in the writings of the medieval schoolmen, Calvin's Geneva used their inquisitional methods in the conduct of law and government. Thus, Calvin is distinguished from men such as Hugh Latimer of Cambridge, who stated that when he "began to smell the Word of God" he "forsook the doctors of the schools . . . ." Latimer lived in a tradition of common law, easily available to replace the scholastic doctors and their doctrines.

Though Calvin's Geneva gave methodical attention to Scripture that inured to inestimable benefit for law and government in both Britain and America, Geneva lacked the forms and customs of adversarial processes and protections available at common law. Before scriptural principles of due process realized mature form in government and good play in the operations of law, regrettable events arose in Geneva. Following a patriotic riot and the subsequent exile or execution of the leaders of the Libertine party, Calvin became the undisputed master of Geneva, which he made the capital of the Reformed movement. Other executions occurred at Calvin's consent.[2085]

One ought to forebear, however, from being judgmental and instead take heed. History shows that those bent upon ridding their land of the inquisitorial plague of false doctrine and its handmaidens civil and administrative law, once in power, have used these also, saying in justification that they must fight fire with fire. Thus, Martin Luther

[2085] "[Calvin] ruled Geneva," says W. Kenneth Connolly, "with an iron fist . . . Fifty-eight executions occurred. In fact, thirty-four women . . . Geneva became the Rome of Protestantism . . . . Videotape: The Indestructible Book (Cambridge Univ. Press & Baker Book House, n.d.). *See generally* W.F. Fratcher, "The Government of Geneva Under John Calvin" 9–22 (1938) (unpublished manuscript, copy on file with author) (discussing Calvin's applied polity in Geneva).

advised the German princes to assert absolutism in their realms to cast out the power of Rome; the victorious English Parliament ignored due process in order to silence voices of opposition; Salem, Massachusetts, reacting in fear instead of faith, suspended due process to quell witchcraft; Union officers, ignoring the right to conscience, silence, and due process had preachers beaten and imprisoned without cause;[2086] and now some claim that Islamic threat necessitates suspension of due process and the common-law bar against torture. Due process and the Jury and are the common law's weapons against such heavy-handed acts—of which the common-law tradition, with Scripture, has always remained intolerant.

13
The Regret No One Regrets

The chief New Testament term for *change of mind* is μετανοια (*metanoia*). The Septuagint—popular Greek translation of the Old Testament during the first century—most often uses *metanoia* to translate the Hebrew term *nacham*.[2087] Because English translations render *metanoia* with "repentance" or its synonym "penitence," the Roman Church has succeeded in associating *metanoia* with penance, which, unlike *metanoia*, is foremost an overt act.[2088] *Metanoia*, however, is foremost a change of inward determination.

The Greeks, in forming the term *metanoia*, joined two roots: *meta*, signifying "after" or "change," and *nous*, meaning "reason." Thus, *metanoia* is a change of mind, following reasoned reflection based upon facts. Though *metanoia* can signify depth of regret and sorrow, which often produces change of behavior, the term, considered alone, never reaches behavioral change. Nonetheless, reversal of behavior remains the evidence of "repentance [*metanoia*] unto salvation":[2089] repentance accompanied by faith in Jesus Christ. Therefore, repentance unto eternal life (i.e., accompanied by faith) includes one's determination to change one's behavior, which shall inevitably bring forth acts evidencing a true

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[2086] The best known of these preachers is Chariton County, Missouri pastor and author, Edward McKendree "E.M." Bounds. Against such lawlessness, Union Major General Henry W. Halleck, commander of the department of Missouri, distinguished himself, protesting to General George B. McClellan, commander of all federal forces, but to little avail.

[2087] Hebrew: נחם.

[2088] Not to be confused with the Protestant understanding of "repentance" and its synonym "penitence," *penance* is "a sacrament of the Roman . . . Church that stresses the performance of ecclesiastically prescribed acts to make satisfaction for postbaptismal sins." B.L, Shelly, *Penitence*, *in* EVANGELICAL DICTIONARY OF THEOLOGY 835 (Walter A. Ewell ed., 1984).

[2089] 2 *Corinthians* 7:10. *See also Acts* 11:18: "repentance *unto* life."

change of mind. On the other hand, mere realization of sin (i.e., unaccompanied by faith) produces regret and sorrow only, but no determination to change behavior, and, thus, will never produce deeds evidencing repentance unto eternal life. Such a mind, though now knowing the truth, will never act upon it.

For example, upon discovering Jacob's deception, Isaac deeply regretted having given Esau's birthright to Jacob, trembling violently.[2090] Nonetheless, even in his realization, resulting in regret so deep that it shook soul and body, Isaac's will never changed; thus, his behavior never reversed: Isaac refused to withdraw the birthright he regretted having mistakenly bestowed upon Jacob and to bestow it upon Esau, as he had intended. Likewise Judas, after betraying Christ, suffered deep regret;[2091] yet, it failed to motivate him to action such as that referred to by John the Baptist: "fruits befitting of a reversal of mind,"[2092] viz., repentance unto salvation.

"Regret and sorrow" alone, therefore, are never "repentance (*metanoia*) unto salvation."[2093] Thus, repentance unto salvation is neither change without sorrow nor sorrow without change. Rather, it is a sorrowful feeling that produces unchangeable grit to change: "[R]epentance whereby we forsake sin."

Martin Luther struggled to find a crisp yet accurate translation of *metanoia* (repent). In his first translation of the New Testament, he adopted the phrase, *bessert euch*: literally, "better yourselves," answering to the English "amend your ways." In later years, however, he returned to the more-customary *thut Busse*: a phrase answering to "be penitent." Repentance unto salvation, however, comprises both ideas. In one place, Luther translates *'eine Reue, die Niemand gereuet* (a regret which no man regrets).[2094] Repentance is a change of mind yearning for the

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[2090] *See Genesis* 27:33.

[2091] *Matthew* 27:3.

[2092] *Matthew* 3:8: The Greek *αξιος* (*aksee-ios*) means befitting, rising to the level of, or evidencing. The verb form is *αξιοω* (*aksee-iao*) is the Greek civil-law term for a legal claim: a petition requesting judgment worthy of the injury suffered.

[2093] 2 *Corinthians* 7:10.

[2094] The original reads: *μετανοιαν εις σωτηριαν αμεταμελητον* . . . . "repentance unto [*εις* (*eis*): with a view toward, i.e., looking forward to] salvation not to be repented of." In this instance, *eis* (accusative preposition) signifies the end toward which repentance moves. 2 *Corinthians* 7:10. *See* ROBERT GIRDLESTONE, SYNONYMS OF THE OLD TESTAMENT 89–91 (1897). The phrase "not to be repented of" is adjectival.

For centuries, contention over the translation of *metanoia* has waxed sharp because its translation as required by Rome (*penance*) was vital to perpetuate material wealth and power for the Roman priesthood: penance was an exacted payment accruing to the priesthood. To translate *metanoia* with "penance" appears to justify this payment, but to translate it "repentance" or "penitence" does not.

On 20 January 1542, the convocation of English clergy met. On Friday, 17 February, the convocation took up the Crown's proposal to translate the Bible into English for the people.

salvation that has no pain of mind. True repentance unto salvation puts the hand to the plough and even though discouragement and questioning of one's decision comes, it presses toward the fixed standard at the other end of the field.[2095]

The shortest distance between two points is a straight line; for the ploughman, this means a straight furrow. The only way to plough a straight furrow is for the ploughman to fix his eyes on a stationary object at the far end of the field, such as a tree in the fencerow. Any other method is futile. If the ploughman looks back while ploughing, he takes his eyes off the fixed point at the other end of the field, resulting in a furrow as crooked as a dog's hind leg. Also, over the distance of a quarter or half-mile through, to fix one's eye on an object that appears stationary but slowly moves, such as a grazing cow, will result in a grossly-bowed furrow. As a lad learning to plough, the writer made both of these errors: he kept looking back to see if his furrow was straight; he headed for the neighbor's cow grazing on adjoining property. By analogy, true repentance, or *metanoia*, provides a new fixation on a new and immovable standard. "Dividing aright[2096] the Word of truth," demands that the man of God *cut* a true furrow, *straight* as a stretched string.[2097] The only way to do so is to aim one's eyes on a fixed object as the

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Most bishops, however, opposed the laity's access to the Scriptures; therefore, striving to suppress biblical truth and to maintain the concepts that supported their position and power, they passed a proposal requiring that any translation English made must retain untranslated 102 chosen Latin words. The convocation then charged any translators to never translate the 102 chosen words, instructing them instead to transliterate them.

Penance was among the 102 Latin words to remain untranslated in any English translations of the Bible, but transliterated in order to perpetrate priestly dogmas. "[T]he word *Penance*, which according to the *vulgar sound*, contrary to the *original sense* thereof, was a *magazine of will-worship*, and brought in much *gain* to the *Priests* who were desirous to *keep* that *word* because that *word kept them*." FULLER, CHURCH HISTORY 239 bk. v (1655), *quoted in* 2 D'AUBIGNÉ, *supra* note 19, at 447 (emphasis in original). The Crown rejected the bishops' ambitions, took the Bible translation project from them, and gave it to the faculties of Oxford and Cambridge.

[2095] For the ploughman this means ploughing a straight furrow. The shortest distance between two points is a straight line. Repentance unto salvation results by turning away from the wrong goal, turning toward the right standard, and pressing down on following it.

[2096] 2 *Timothy* 2:15. Both renderings of *ορθοτομεω* (*orthotomeo*), "dividing aright" and "rightly dividing," are accurate. The term denotes a cutting straight of the Word of *truth: αληθεια* (*alaytheia*), that which is firm, fixed, constant, and never wanders. Two times the Septuagint translators use *ορθοτομουντα* (*orthotomounta*) to translate ישר (*yashar*): from *ορθος* (*orthos*), "right," and *τεμνω* (*temno*), "to cut." The Hebrew *yashar* signifies that which is straight; nowadays one says, "on the level." For example, because Hezekiah tunneled his aqueduct through solid stone, he did so by the shortest distance between two points. The chronicler, therefore, uses *yashar* to describe its straight course. *See* 2 *Chronicles* 32:30. *Orthotomeo* expresses the equity of our common law: the right application of law as limited to the facts of the case under consideration, trusting future right applications to later generations.

[2097] *See id.*

standard (the Author and Finisher of our faith), and never look back to assess the furrow, but instead, "bear down on the mark."[2098]

Repentance unto salvation is also illustrated by the man fascinated by his shadow as he walks away from the light of God's truth and toward the boundary beyond which is sin. As he walks, he advances toward the darkness of his own shadow. If he turns ninety degrees to his right or left and walks parallel to the boundary, the fascination of the darkness of his shadow remains visible and available to draw him toward sin. Repentance, however, entails his turning 180 degrees from walking straight at sin and his shadow and walking straight toward the light of God so that the fascination of neither his sin nor his shadow is no longer visible. Only that which blocks light casts a shadow. Thus, light casts no shadow;[2099] God is light.[2100]

The eternal Creator, never the mortal creature, is the standard of right and wrong. The battle for truth and righteousness is in the mind; repentance unto salvation is a change of mind in the sense of changing one's clothes: taking off one set and putting on another. Man does not need a reformed life or mind; he needs a new mind and different life. Man, therefore, needs a new birth, for with it comes a new mind, a new way of viewing this present world (life and worldview) and a new way of viewing law and government: a never-changing change of mind.[2101]

[2098] *See Philippians* 4:13. Looking back is a bad habit.

[2099] *See James* 1:17.

[2100] *See* 1 *John* 1:5.

[2101] God's standards and promises are eternal and immutable. *See Psalm* 15:4. Any Scripture stating that God has, or will, change His mind speaks of God refusing to break His promises or otherwise violating His law. God's law and promises are both expressions of His commitments and undertakings: these are His Word; God keeps His Word.

The King James Version renders the passive (Niphal stem) of the verb נחם (*nacam*) with "repent" 38 times; most of these instances refer to God, not man. *See*, *e.g.*, 2 *Samuel* 15:11, 29. *Nacam*, however, does not denote ultimate purpose, but is emotive and, therefore, incomparable to *metanoia*, the non-emotive New Testament Greek term translated "repent." The Old Testament term best compared to the New Testament's *metanoia* is שוב (*shuve*); better than any other Hebrew verb, *shuve* combines the two distinguishable yet wedded properties in *metanoia*: a determination to turn from evil to good.

Thus, any purported changes in God are an anthropomorphic literary device used to affirm that God never goes back on His Word, even though it *appears* to men (in their ignorance and impatience) that He has. *See*, *e.g.*, 2 *Peter* 3:3–9. In each case where Scripture indicates that LORD has repented, investigation reveals that the repentance spoken of is the LORD's determination to turn away from His emotional impulse to neglect His promises. These instances never allude to the LORD neglecting His promises. Indeed, nowhere in Scripture does the LORD's violate His Word.

14
Rights in Property & Property in Rights

During the final decades of the nineteenth century, the United States Supreme Court guarded with zeal individual rights in property and freedom of contract.[2102] Other, however, zealous for expediency at the expense of law and right, criticize the Court of that day, claiming it failed to take consideration of the public good. In guarding individual property rights, however, the Court was in keeping with the common-law tradition: "[T]he public good is in nothing more essentially interested than the protection of every individual's private rights." The only way to guard the common good with success is one case at a time. Thus, the courts, not the legislature, are the leading guardians of the common good. By tradition, common-law courts focus on finding individual justice in concrete terms of past deeds done, concerning only the parties before the court; by contrast, legislative bodies speak to the common good in abstract terms of future speculation, concerning everyone.

By focusing on individual justice, common-law courts also establish the common good by setting precedent. The Supreme Court's vindication of individual rights in property during the late nineteenth century, was commendable. The root cause of the abuses that occurred during those years never originated out of court findings and opinions, but were from Congress's legislative largess and granting of exclusive privilege to favored parties. Indeed, some of the country's wealthiest tycoons, enjoying the greatest largess through Congress's legislative sanction of monopolies were members of Congress.

Critics of the Supreme Court's protection of property rights and rights of contract sometimes go further and attack the Framer's constitutional phrase "life, liberty, and property," preferring the Declaration of Independence's phrase, "Life, Liberty, and the Pursuit of Happiness." These critics, however, fail to recognize that the pursuit of happiness is also a right, and Thomas Jefferson, the fellow who drafted the phrase, "Life, Liberty, and the Pursuit of Happiness," said in addition that we have property in our rights, and rights in our property. Put another way, one has no rights without private property because only property comprises rights. It is only in private property, whether tangible or intangible, that one enjoys one's rights. Thus, rights and property are two strands inextricably woven into the single cord, upon which the hefty

[2102] A contract right is a property right also. One's rights and one's property cinch together: one's right is one's property; one's property is made of one's rights. Either one without the other is a nullity.

weight of liberty hangs; to cut away at one strand is to overstrain the other.

In those days complained of—the late nineteenth century—Justice Brewer affirmed, "[T]he Declaration of Independence is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."[2103] Justice Brewer's statement is in keeping with Scripture: Jesus upheld both the letter and the spirit of law as indispensable.[2104] The *letter* anchors the *spirit* in the leading first precepts; the spirit guides the letter in the particular application: each is the necessary compliment of the other.

Property rights and freedom of contract fall under the single heading "rights" because rights are property. In this sense, "property rights" is a redundant phrase.[2105] Liberty rises and falls with private property, with rights in property, and with property in rights. To replace private rights in property with public rights is to do away with all rights. In a word, that which is said to belong to all belongs to none and will be enjoyed by none. To enjoy one's right, one must pursue its benefit as one's personal possession given by one's Creator.[2106]

15
Kingdom:
The Bible's Term for Jurisdiction

In the ancient world, *kingdom* signified foremost jurisdiction (the authority or right to act) over persons, not over any particular territory. Ancient pagan kings ruled in the tradition of the civil law: they aimed to dominate people. In the spirit of Nimrod, the mighty hunter of men, ancient and modern demagogues have sought to exercise power and dominion over humanity. "The princes of the Gentiles," said Christ,

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[2103] Gulf, Colorado & Santa Fe v. Ellis, 165 U.S. 150, 160 (1897).

[2104] See generally *John* 4:24, for Jesus' explanation of the distinction between spirit and truth, while holding both indispensable to God's standard for true worship's.

[2105] *But see* ROSCOE POUND, SPIRIT OF THE COMMON LAW 53 *and* ff. (1921). At times, Dean Pound appears to reject fundamental tenants of the common law, while praising its spirit. Using the common law's common-enemy doctrine—concerning rainwater runoff that flows across level land and thus unconfined to any channel—as an example of the common law having taken property rights to an unhealthy extreme, he exalts the superiority of the civil law over the common law. Dean Pound, in league with the spirit of his times and the intellectual elite of his day (1921), felt that the common law's tendency to protect private property hindered doctrines of socialism following in tow of America's rapidly growing industry. Today, however, though heavy industry in America has declined, the common law is still thrives.

[2106] Christ Jesus is the Creator-God confined to a human span: at once, the Creator and man (*see Colossians* 1:16), Son of God and son of Adam, and the only authorized Mediator between God the Father and those of Adam's race. *See* 1 *Timothy* 2:5.

"*dominate* them without ceasing . . . ."[2107] Tyrants are willing to conquer territory only as it satisfies to their lust to dominate people, using state power.

Recall that God's plan and covenant is never that men dominate one another. Adam's race, rather, is to focus its energy on wielding deft dominion over the earth, according to God's Word.[2108] God has further divided larger portions of the earth among certain groups and smaller parcels to individuals. In applying this covenant responsibility to Israel, the LORD defined with precision the boundaries of His specific land grant to that nation. These boundaries were a mark of divine distinction[2109] meant to delineate the LORD's allotment of authority to Israel over a bounded territory of His earth. God's Old Testament legal formula referred to the LORD's specific land description: "the land the LORD your God has given you."

By contrast, ancient Babylonian systems of law and government carved out territorial boundaries only as a means of designating those persons over which the state claimed power. God, however, has entrusted His jurisdiction "over the earth and the fullness thereof" to man, to exercise according to God's directives; whereas tyrants exercise their power over men, according to their own will. In summary, God's design for those of Adam's race is that they exercise intelligent lordship and control over the earth, according to God's directives and for His glory.[2110]

[2107] *Matthew* 20:25. See generally §§ 2.1–2.1.3, 2.4 of this book (discussing the establishment of the civil-law tradition at Babylon with its system of domination of people as opposed to taking dominion over the earth).

[2108] Depending upon the context, the Hebrew ארץ (*'eratz*) signifies the entire earth or a parcel of it (a tract of land) that is to be used to achieve God's purposes, by God's methods, and as God's law directs: "the way pointed out" (תורה: *torah*). If the inhabitants of a particular land parcel (*e.g.*, a country) ignore God's directives concerning God's ends (purposes), or God's means (process), that land, declares Scripture, shall vomit out the offending inhabitants. *See Leviticus* 18:25. See also *Genesis* 3:23–24, for the earliest example of God as landlord, ejecting offending tenants. In describing this ejection, the Hebrew text uses the language of the herdsman moving his livestock: God *shooed* them (vs. 23, ישלחהו: *yi-shalakei-who*, onomatopoetic term imitating a sound; intensive active Piel stem, as one *shoos* away a flock of chickens or a pesky fly) and *drove* them out (verse 24, יגרש: *yi-garesh*, also in the intensive stem, as one drives cattle). God, at His discretion, has allotted parcels of His earth's land among Adam's race; He holds the inhabitants in each of these prescribed territories responsible—individually and nationally—for the care and productivity of the land an individual or nation inhabits or for which they are otherwise responsible. *See Deuteronomy* 32:8, *Acts* 17:26.

[2109] *See, e.g., Deuteronomy* 1:1–8.

[2110] Satan's lie, propagated through Babylon and her progeny, is that a man will find fulfillment by dominating his fellow man. Some complain that men ought not dominate anything. This complaint fails to acknowledge, however, that the Creator has filled man with abundant energy and creative power that man is unable to contain. God in His grace has instructed man where to focus his energy and power, and by what method to expend it. We are not to use it to subdue one another, but to serve one another and subdue the earth for God's purposes and glory.

The New Testament writers furnish additional insight into the ancient world's concept of *kingdom*, the traditional translation of the New Testament term *βασιλεια* (*basileia*): administration of government authority, but not always confining this authority *to act* to prescribed territorial limits. At bottom, *basileia* means "authority," in the sense of "jurisdiction," e.g, the entrusted right to administer.[2111] It denotes procedure but includes the right to act as opposed to the naked power to act absent that right, whether over certain people or places. Often translated *kingdom* by historical acceptance, *basileia* refers specifically to God's forms, processes, and grant of authority to administer government. In the ancient pagan world, *kingdom* signified authority over persons, without immediate thought of defining a territory.

For example, in *Luke* 19:11–15, Jesus, using a parable, described the Kingdom of God, saying, "A nobleman went into a far country to receive [*a*[2112]] kingdom [*βασιλεια: basileia*] and then returned." This nobleman wanted to exercise authority within his home country. However, having no *authority* or right to do so, but knowing that another person at a far place held this authority with the right of delegation, he traveled to this man and asked him to entrust the desired authority to him, to be exercised upon his return to his home country. Thus, the nobleman traveled not into another country that be made king over a particular bounded territory there, but rather that he receive a commission to carry home.

To illustrate, the writer once had an American client, who had invested in property in the United States. A Canadian, however, owned the property but had neglected it, putting the American's investment at risk. This American, therefore, traveled to Canada, informed the Canadian of the effect of his neglect, and obtained from the Canadian a power of attorney granting authority to the American to exercise power over the Canadian's property in the United States. As the man in Jesus' parable, the American did not go up into Canada to receive and exercise authority (*basileia*) there; rather, he traveled to Canada to get authority—the delegation to act—and returned to the States to exercise that authority in his home country.

[2111] Sometimes usage of the English terms *authority* and *jurisdiction* is undistinguishable, but at other times, these stress distinguishable aspects of the concept "right." Authority points to the source or author (i.e., originator) of a right; jurisdiction points to the exercise of that right. The two comparable New Testament Greek terms are *εκουσια* (*ekouseia*) and *βασιλεια* (*basileia*): *ekousia* is comparable to authority; *basileia* is comparable to jurisdiction. Thus, "authority" stresses the source or author of a right to speak or act; "jurisdiction" stresses the exercise of that authority.

[2112] The original has no article: "A nobleman went into a far country to receive *kingdom*," that is "to receive authority."

Consider further the example of Nebuchadnezzär's son, King Belshazzär. In *Daniel* 5:26, Daniel tells Belshazzär, "God has numbered your *kingdom* [*melecku*[2113]], and brought it to an end." It is impossible that this prophecy refers to the Babylonian Empire because history is clear: that Empire continued; Babylon's territory and people remained intact. God, however, did transfer Belshazzär *authority* (his kingship over the "kingdom") from Belshazzär to Darius the Mede.[2114] Though God ended Belshazzär's kingdom (authority), He never destroyed it; rather, He took away Belshazzär's *authority* of administration and gave it to Darius. By ending Belshazzär's authority to administer government, God ended Belshazzär's kingdom. God is sovereign in the unlimited and absolute sense, not in the limited and human political sense. Because He holds all authority, and the power to grant it to whom He will, He also holds all authority and power to take His authority from one and transfer it to another.

Two Hebrew Old Testament terms for *kingdom* are comparable to the New Testament's *basileia*, each stressing a different aspect of authority, or jurisdiction: *mishphat*[2115] and *melekuth*.[2116] *Mishphat* highlights the form and manner of administration in government's exercise of jurisdiction; *melekuth* highlights the sovereignty aspect of jurisdiction.[2117] All authority (kingdoms) belongs to its Author, who is God. Further, though God transfers His authority from one person to another in varying amounts, none of His authority ever ceases to exist.

In *Daniel* 2:37, Daniel begins his description of Nebuchadnezzär's kingship, using the Aramaic superlative, "You [are] *the* King, the King of Kings . . .":[2118] by expansion, "It is impossible for any man to have more of the attributes of kingship than you have."[2119] Daniel then expounds his

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[2113] Aramaic: מלכו.

[2114] *See Daniel* 5:31. See generally JOHN C. WHITCOMB, JR., DARIUS THE MEDE (1959), for an in-depth treatment of Daniel's chronology and the identity of Darius the Mede, in light of Scripture and the cuneiform references.

[2115] Hebrew: משפט.

[2116] Hebrew: מלכות.

[2117] See generally app. 3 of this book (discussing משפט: *mishphat*, the Hebrew term denoting the means or manner of government administration required by law, as opposed to the contemplated *ends* justice). The results God desires of government (justice) are only possible if men observe the methods (procedure or due process) He has ordained.

[2118] Aramaic: אנתה מלכא מלך מלכיא.

[2119] Other examples of this Semitic superlative construction appear in *Exodus* 26:33: קדש הקדשים (Holy of the Holies: the place of incomparable Holiness); *Song of Solomon* 1:1, שיר השירים (Song of the Songs: the excellent song); and *Exodus* 31:15, שבת שבתון (Sabbath of Sabbath: "Sabbath of obligatory rest"). In this last example, the final ן (*nun*) further stresses the superlative character of the Sabbath by denoting the ending of work. In all such cases of the Semitic superlative construction, comparison is not in view (i.e., greater than all others of like kind), but incomparableness. It highlights the impossibility of the thing of which one speaks having any more of the attributes of the quality expressed.

description with a list of kingly attributes, each resulting from the one previous, "the kingdom, the power, and the might, and the glory . . . ." This is not a list of synonyms, but a progressive list of distinct concepts, the lawfulness of each concept depending upon the one before it. *First*, the *kingdom* is "the right to administer," which is authority or the right to exercise power. *Second*, resident with this authority (kingdom) is *power*, which is a static, but latent, ability or potential. *Third*, resulting from this potential is *might*, which is potential released and made patent by action. *Fourth*, *glory* is the sheer gravity of the king's presence, demanding reverence and resulting from His kingdom, power, and might.

"The Semitic frame of mind emphasizes the concrete rather than the abstract."[2120] The Old Testament terms for *kingdom* also stress the concrete and are neither abstract, nor hidden, nor mystical. Thus, we are to pray with understanding, "For the Kingdom [authority and jurisdiction] is yours . . . ." This prayer is no mystical request to be recited as an incantation: in empty repetition without clear purpose. Further, Christ instructs us to seek first—that is, before anything else in life—His *authority* to administer His government. Moreover, to seek His Kingdom, is to seek His authority concerning two aspects of our personal lives and government: form and substance. We are to conform the substance of His standards (His righteousness) to the forms and procedures of His government administration (due process). The leading principles of the common law are tools enabling practical and proven results in pursuit of both the righteousness and forms of God's standards.

16
New Law—Even Though Old in Time

Law is the discovery of the application of truth. This leading ideal of the common-law tradition has lasted through the Norman period and the Reformation to the present. Believing that law is eternal because the God of creation, the divine fountain of law, is eternal, the courts of medieval England claimed only to discern and declare the application of law that had always existed, never to make law. In those early days, as today, the undiscerning brush of legislation, being abstract from the conflicts of real relationships, obscures this principle. Sweeping generalizations of canon-law theorists followed by high-handed state action aimed at forced uniformity—all by faith in the distant decrees of legal scientists—erodes liberty of relationships freely entered, and the resultant benefits.

[2120] CHARLES LEE FEINBERG, PREMILLENNIALISM OR AMILLENNIALISM 296 (1954).

Nevertheless, underneath these abuses has persisted the common law's first principle, reasserted through court opinions and remaining foundational to the common-law worldview: what appears to be new law is rather a fresh articulation and application of the old principle that has existed from eternity past, and will continue to exist through eternity future. The fresh application, says Blackstone, vindicates the old principle from misrepresentation; this comports with God's Word. As Hilkiah discovered the old and forgotten book of the law and renewed it to his people, it is good and necessary that the individual renew old truth to himself and then to his country,[2121] by fresh application.

"Beloved," says the apostle, "I am not writing a new commandment to you but, rather, an old commandment, which you have had from the beginning . . . at the same time, I am writing a new commandment to you . . . ."[2122] John says that the commandment of which he speaks is old and new at the same time, but each in its own sense. Of the two Greek terms available to speak of two aspects of "new"—*καινος* (*kainos*) and *νεος* (*neos*)—John uses only *kainos*. However, Paul the apostle and the other three evangelists besides John—Matthew, Mark, and Luke—use both *kaivos* and *neos*. John's choice of *kainos* only is significant.[2123]

In this verse, John stresses that the commandment he references, though new to his hearers, is as old as time itself; his readers have even heard this commandment before. Nonetheless, as old as it is, it is new to his readers because they have never used it by trusting God in obedience to it. *Kainos* never means a thing is new in time, but stresses that a particular person has never seen or touched that thing, i.e., it is new to *that* person. John, therefore, uses *kainos*. By contrast, *neos* denotes "new" with respect to time: viz., recent. For example, a car fresh off the assembly line is both new respecting time and new because it has never been driven: i.e., it is without wear or tear. Which of these two terms a Greek writer will use to describe such a car depends upon which of two

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[2121] *See* 2 *Kings* 22:8–23:25. This renewing of God's Word to the nation of Israel resulted in a doing away with Babylonian doctrines of imperial civil law and government. See generally 2 *Kings* 23:10–11, 13, for references to *molech* worship (*id.* at v. 10, מֹלֶךְ). See also generally § 2.6.1 of this book and accompanying notes, discussing Molech worship as ultimate veneration rendered to the state in the person of the emperor as the son of the *sun*, i.e., the sun incarnate (*id.* at v.11, לשמש). See also generally § 2.1.2 of this book and accompanying notes, discussing the civil-law "sons of god" and *the high places* (*id.* at v. 13, את־הבמות) thought to lend political power to the worshipper of the state. See also § 4.5.1 of this book and accompanying notes.

[2122] *John* 5:7.

[2123] John the apostle's writings demonstrate his uncanny knack to express and distinguish weighty concepts with a small vocabulary. John exercises his versatility through creative use of verb tense, verb aspect, and grammar.

aspects he wants to stress: that it is the latest model (*neos*) or that no one has ever driven it (*kainos*).

Likewise, when a person purchases a car from a used car lot, the car, though old respecting time (*neos*) is new (*kainos*) to the purchaser because he has never before driven it; driving it is a new experience. In this verse, John stresses that the directive of God—His gospel (*Torah*: the way pointed out)—is not new respecting time because as God's precept, it has existed from the beginning—as long as God has existed: that is, from eternity past. At the same time, however, the command is new to the new believer, in that he has never experienced it and enjoyed the advantages of obeying it.

Years ago, the writer's younger brother bought a pair of boots, fresh from the boot maker; though he kept them for years, he never wore them. Then one day he gave them to the author. These boots were not new (*veos*) respecting time, but they were new (*kainos*) to me because I had never used them. Likewise, the gospel and its precepts are not new with respect to time, but are older than the events of *Genesis* 3:15, when God first revealed them, reaching back to the events of *Titus* 1:2, and even further, having always existed in the mind of God. On the other hand, the gospel precept is as fresh as the morning to the new believer because he has never experienced it in obedience: it is new to him.

When the pagan Anglo-Saxons assembled in *moot* or jury to judge a case and then discerned, discovered, and declared the application of the law, they believed that they had found its intended meaning respecting the conflict at hand. That by their judgment they manufactured new law was unthinkable; such a notion was foreign to their understanding. Thus, in declaring judgment (*wyrd's* doom), they never manufactured new law, but vindicated the old standard by a new application in the present time.

The common-law judge, says Blackstone, is "sworn to determine, not according to his own private judgment . . . [and is] not delegated to pronounce new law, but to maintain and expound the old one [unless] contrary to the divine law. But even in such cases being contrary to the divine law, subsequent judges ought never pretend to make a new law, but to vindicate the old one from misrepresentation."[2124]

17
Who Governs Lawyers?

Some complain that American lawyers are untrustworthy because lawyers are officers of the court; therefore—so the argument goes—the

[2124] 1 BLACKSTONE, *supra* note 12, at 69–70.

lawyer's first loyalty is to the court instead of to his client. Such complaints, however, reveal misunderstanding. An American lawyer's oath and loyalty is to the first principles of the law as set forth in the Constitution, never to any court. It is the duty of every lawyer—whether he sits on the Bench or argues before the court—to insure that the court upholds the Constitution by insisting that the court observe due process[2125] and that any articulation of the law and its application remain within the law's purposes. In exercising this responsibility, each lawyer is under a duty to make independent judgment, as God gives him the light to discern and to exhaust all available procedural remedies to resist lawlessness and lawless applications of law.[2126]

Lawyers, as all men, hold direct and individual responsibility to God. As an additional enforcement of this duty, the common-law tradition makes lawyers accountable to courts that are to be independent of the executive and legislative branches. That the common-law makes lawyers accountable to courts never lessens their direct duty of loyalty to the majesty of the law, where the courts hold contrary. Lawyers, as are all others that come before the common-law courts, are accountable to courts. As long as the courts are independent of the legislative and executive powers, lawyers, as all others, remain freer to entrust themselves to the law instead of to other men, or even blindly the will of judges.

The greater danger, however, is not that lawyers are officers of the courts, but rather, that judges—and therefore the courts—will become dependent upon the executive or legislative branches for their jobs and pay. Such controlled courts will become the tool of the powerful to control the lawyers practicing before the courts, bringing them under central and uniform control, rendering their independent judgment and the rights of those they represent a nullity. Bottom line: the lawyer must remain free to govern himself, so that he can insist upon due process.

Put another way, if the executive or legislative branches hold sway over the courts, these branches will also hold sway over the lawyers

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[2125] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

[2126] *See generally* 1 *Timothy* 1:8: "But we know [*οιδαμεν* (*oidamen*), from *οιδα* (*oida*), perfect active indicative: knowledge that the mind and reason has directly, and conclusively, grasped] that the law is fitting [*καλος* (*kalos*): a visible outward application suited to a good inward intent] if a person uses it lawfully. Knowing [*ειδως* (*eyedos*), from *oida*: perfect participle] this: that *law is not enacted for a righteous man* [*δικαιω* (*dikaio*), from *δικαιος* (*dikaios*): the expression of a legal judgment acquitting the accused, thus here, *an acquitted man*], but for lawless men . . . ." (demonstrating that the law's lawful application as a punitive tool is confined to guilty acts motivated by guilty minds).

through the courts: the courts will become the state's tool to silence the lawyers and prevent their defense of those of whom the state disapproves. A court obstructs justice when it unlawfully hinders a lawyer's freedom to argue and present evidence in defense of his client.

In common law countries, such danger is always real. The English Puritans complained that the Crown, having failed to achieve the civil law's direct imperial powers over England's lawyers, claimed indirect control over lawyers as officers of *its* courts: that which the Crown failed to gain by direct means, it sought to gain by indirect means, i.e., through control of the courts. Today, in like manner, an overbearing state threatens, by indirect means, the independence of our judiciary and, as a result, the independence of lawyers by two practices: appointing and employing judges from the civil-service ranks (i.e., from attorneys pursuing government careers) and taxation of judges' incomes.

The larger government becomes, the more attorneys the government will employ. As a result, of the total pool of lawyers and attorneys in government and in private practice, increasing proportions will be government attorneys, increasing the likelihood that kept attorneys will be chosen as judges, as opposed to drawing judges from lawyers in private practice. Experience shows that former government attorneys, sitting as judges, are less-disposed to appreciate the problems of private sector relationships and the rights of the accused, but instead, are predisposed toward the will of government. In modern England, more lawyers work for the government, or corporations heavily regulated by the government, than practice in the private sector, diminishing the private-sector pool of lawyers from which judges are drawn. The result? More and more judges know only administrative and criminal remedies.

Respecting taxation, within recent years federal judges have petitioned the courts because Congress has violated the Constitution by diminishing these judges' income through certain tax provisions. Any power, direct or indirect, that taxing bureaucrats and prosecutors hold over judges will compromise their independence and, consequently, the independence, loyalty, and heartiness of all lawyers. Because lawyers are officers of the courts and under the authority of judges, if legislators dominate judges—through threat of the taxing power or otherwise—legislators will also dominate lawyers.[2127] In short, where legislators control judges, legislators will control lawyers through judges.

[2127] In disciplinary matters, lawyers are subject to either their state's Bar association or to their state's highest appellate court. The adversarial, competitive character of common lawyers, results in an unwillingness to cooperate one with another. Thus, Bar association control is the better option because court control gives greater opportunity to control lawyers by simple control of a single institution: the highest appellate court. If lawyers are governed by a Bar association of mandatory membership, power is scattered wide and,

18
Tyndale's Phrase:
The Powers That Be

Through Tyndale's translation of the Bible, colloquial phrases of his ancestral home among the folds of the Cotswold scarp in Gloucestershire have persisted. Among such now familiar phrases is Tyndale's rendering from *Romans* 13:1: *the powers that be*.[2128] A phrase from his time, and likely from his home in the west of England,[2129] by its lilt, has survived the scrutiny of King James's translators and revisers following. Nowadays, the phrase signifies any earthly government that dominates by sheer power, with or without authority. In *Romans* 13:1–2, Paul refers to the Babylonian system of law and government, as working through Rome. "The powers that be" rings of the scholastic tradition of which Tyndale was familiar: a system aimed at justifying the status quo as it stood in the combined temporal and non-temporal powers of Roman law and government, that is, the total state. By this phrase, Tyndale distinguishes imperial governments of men from a government of law.

Though Tyndale's translation of *Romans* 13:1–2 remains good English, it confuses the divine distinction between *authority* and *power*:

> 1. Let every soule submit himselfe vuto the *autorite* of ye hyer *powers*. For there is no *power* but of God. The *powers* that be are odeyned of God.
> 2. Whosoever therefore resysteth *power* resisteth the ordinaunce of God. And they that resist shall receave to the self damnacio.[2130]

Thrice in these two verses, Paul the apostle uses εξουσια (*eksee-eousia*): authority.[2131] Tyndale translates *eksee-ousia's* first occurrence aright

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therefore, more difficult for an outside power to dominate. Practical and applied liberty does not depend upon an independent judiciary and jurors only, but also upon lawyers of independent legal judgment. Such independent judgment insures the adversarial essence of our common-law tradition, which is indispensable to liberty.

[2128] *See Romans* 13:1: αι ουσαι (*ai ousai*: present participle of ειμι [*eimi*], "the ones being," therefore, *that which is existing*).

[2129] It is reasonable to conclude that Tyndale's translation *the powers that be* is original with him because, over 150 years earlier, Wyclif had rendered the same passage from Jerome's Latin Vulgate much different from Tyndale's translation: "tho thingis that ben of God" (archaic spelling in original).

[2130] Archaic spelling in original; emphasis added.

[2131] Greek εξουσια (*eksee-ousia*): "authority," indicating that jurisdiction—the right to act—finds its ultimate source in the author of that right, "author" and "source" being synonymous.

with *autorite* (authority), but he translates the next two occurrences of *eksee-eousia* with "power." Thus Tyndale's translation, "the *autorite* of ye hyer *powers*," implies that authority results from power. Moreover, Tyndale adds the plural noun "powers" twice, where Paul omits it from the Greek text: "ye higher *powers*" and "the *powers* that be." Tyndale's failure to distinguish the Greek terms for "authority" and "power" in these verses is likely due to the influence of John Wyclif's prior translation from Jerome's Latin Vulgate into English.[2132]

Paul uses the Greek root *ουσια* to stress that all authority proceeds out of the *being* of God. Because God is the source and ground of all being (*ουσια:* ***ousia***, that which has being), all authority (*εξουσια: eksee-**ousia***, that which originates from within that being) is traceable back to the Godhead, the fountain of all being (*υπερεκουσιας: hyperek-**ousia***, that which springs up from that being).

In recent decades, English translations of *Romans* 13:1–2 often translate *eksee-ousia* with "authority" instead of "power," thereby distinguishing right (authority) from might (power). *Right* (*eksee-ousia*: authority), in the context of *Romans* 13:1, signifies criminal jurisdiction: the authority to use force, which proceeds only from God, the fountain, or Author, of all being. *Might*, on the other hand, is raw power: that domineering exercise of force, or threat of force, that one rightly exercises only with authority. Only where authority precedes the exercise of power is that exercise lawful. Thus, no one ever has the right (authority) to do wrong.

[2132] Wyclif translates *Romans* 13:1–2 from Jerome's Latin Vulgate:

> 1. Euery soule be suget to heiyere powers. For ther is no power but of God, and, ben ordeyned.
> 2. Therfor he that ayenstondith power, ayenstondith the ordynaunce of God; and thei that ayenstonden, geten to hem silf dampnacioun. (archaic spelling in original).

In translating this passage, Wyclif and Tyndale differ: Wyclif uses only "power," but Tyndale uses the term *autorite* ("authority") once and "power" the remainder of times. Jerome's Vulgate, from which Wyclif translated, makes no distinction between Paul's terms, consistently translating *eksee-ousia* (authority) with *potestas*, a term indicating raw force and, according to Livy's usage, political force. *See* CASSELL'S NEW LATIN DICTIONARY 460 (1st ed. 1960). It is therefore possible that Jerome's failure to follow Paul's vocabulary in distinguishing authority from naked power influenced Tyndale. The 1599 Geneva Study Bible translation follows Jerome on this point: "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God." Later English versions continued to ignore the distinction between authority and power. *See, e.g.*, *Luke* 10:19, where Tyndale's translation and the King James Version has "power" for both *εξουσια* (*eksee-ousia*: authority) and *δυναμις* (*dunamis*: potency).

French translators understand *eksee-ousia* in *Romans* 13:1–2 to be authority instead of raw power, always translating it *autorité*,[2133] as also Martin Luther understood.[2134] Following Paul's use of terms leads one to conclude that *Romans* 13:1–2 binds men to subject themselves only to that power ordained by God's authority;[2135] and that any power exercised outside the scope of God's authority is lawlessness. This passage further defines God's authority as that which is a terror to evildoers. Thus, any exercise of government power that terrorizes those doing good deeds neither proceeds from God's authority nor operates within the scope of it.

The competing ideals of law and government afoot in Europe in Tyndale's day formed distinct conceptions of authority and power; Tyndale understood the difference. Samuel Rutherford, discussing these same verses over a century later, explained his view of the relationship between authority and power, but sometimes used the term "power" to denote *eksee-ousia* (authority),[2136] stating that although Scripture distinguishes to two, to do so is unnecessary—at least for purposes of his refutation of Rome's divine-right-of-kings theory.[2137]

Comparing Scripture with Scripture, Samuel Rutherford tightly reasons his analysis of *Romans* 13:1–2, concluding, as doubtless Tyndale did, that according to Paul's language in *Romans* 13:1, God alone is the exclusive source of authority.[2138] Rutherford discusses Paul's use of the preposition *'υπο* (*whopo*) with the genitive case[2139] to express God's transcendence through a principal and agent relationship: God as the principal works His authority through the mediate agency of His creation, as also through his creatures:[2140]

[2133] *See Romans* 13:1–2 (La Sainte Bible: Traduite d' Après Les Textes Originaux Hébreu et Grec).

[2134] Luther also distinguishes Paul's terms, translating *eksee-ousia* with *Obrigkeit*. *See Romans* 13:1–2. (Die Bible: Nach Der Übersetzung Martin Luthers).

[2135] *See* SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 172–75 (photo. reprint 1982) (1644) (discussing the meaning of Paul's choice of Greek terms for authority in *Romans* 13:1–2.

[2136] *See generally* SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 172–75 (photo. reprint 1982) (1644).

[2137] *See id.* at 172.

[2138] Rutherford writes, "ιαν μη [sic; available manuscripts read only ει μη (*ei may*)] will refer to God alone as the only cause, *in genre causa prima*." *Id.* at 174. Paul's phrase in *Romans* 13:1, *ei may*, is often understood as *except*, or as Rotherham has it, "save": "For there is no authority *save* [except] by God." JOSEPH BRYANT ROTHERHAM, ROTHERHAM EMPHASIZED BIBLE (photo. reprint 1984) (n.d.).

[2139] Greek *υπο* (*who-po*: "under," used with the genitive to express agency, i.e., *by* or under another's authority).

[2140] SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 175 (photo. reprint 1982) (1644). The phrase *free moral agent* is a contradiction in terms. An agent, by definition, is not free: the terms and directives of his agency restrict him. Where an agent acts outside the terms of his agency, he has no authority, i.e., he acts without the agency. The authority of his agency depends upon his obedience to his principal: God. Where he

> God alone giveth rain but not for that immediately, but by the mediation of vapors and clouds. "God alone killeth and maketh alive." Deut. xxxiii. 39, that is, excluding all strange gods, but not immediately; for, by his people's fighting, he slew Og, King of Bashan, and cast out seven nations yet they used bow and sword as it is used in the Book of Joshua; and, therefore God killed not Og immediately. God hath an infinite eminent transcendent way of working so that in his kind he only worketh his alone; . . . God only giveth learning and wisdom yet not immediately always—often he doth it by teaching and industry.[2141]

Passages appearing obscure or ambiguous are understood aright only when construed consonant with those passages speaking to the same matter that are clear and unambiguous, and not vice versa.[2142] Applying

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acts outside the scope of his principal's directives, he acts without his principal's authority; where he does this, his agency ceases. Although by disobedience one acts outside the scope of God's directives, God has forbidden him to do so. To act outside of God's directives is to outlaw one's self and to forfeit the protection of God's law. The very act of obeying God's directives is to exercise God's agency and place one's self within the scope of God's protection. "The servant hath no more authority than the master giveth; but the king, in lawless commandments, gave nothing royal [lawful] to his cut-throats, and so nothing [is] legal." *Id*.

[2141] *See generally* SAMUEL RUTHERFORD, LEX, REX: OR, THE LAW AND THE PRINCE 174 (photo. reprint 1982) (1644).

[2142] That no passage shall be interpreted in a sense repugnant to others speaking to the same subject is hermeneutic's leading principle. One cannot overstate its importance. *Romans* 13:1–2 has been a point of contention for centuries. A right interpretation of these verses will be in harmony with the clear truth running throughout Scripture on the subject addressed by these verses: one is to obey God rather than men (government).

Protestant hermeneutic science calls the forgoing principle of interpretation *the analogy of faith*, a phrase taken from *Romans* 12:6, but used in a different sense (*την αναλογιαν της πιστεως*: *tan analogian tas pisteos*). The interpreter is not to balance two passages appearing inharmonious or contrary by taking some of the meaning out of one or both so that the two appear consonant; rather are to be understood in light of clear expressions of Scripture. Sometimes expressed by the phrase, *the main thing is the plain thing*, observance of this rule requires the interpreter to distinguish the peripheral from the central:

> The obscure text must be interpreted in light of those which are plain and positive. "The faith," says Fairbairn, "according to which the sense of a particular passage is determined must be that which rests upon the broad import of some of the most explicit pronouncements of Scripture, about the meaning of which there can be, with unbiased minds, no reasonable doubt."

MILTON S. TERRY, BIBLICAL HERMENEUTICS: A TREATISE ON THE INTERPRETATION OF THE OLD AND NEW TESTAMENTS 579 (photo. reprint, n.d.) (1898). The Church of England includes this principle in its Articles of Religion: [I]t is not lawful for the Church to ordain anything

this principle to *Romans* 13:1–7 demands that any issue arising from these verses upon which reasonable minds disagree, must be understood consonant with unambiguous passages speaking to the same matter. In short, sound interpretation moves from that which is clear to that which is unclear.

Pondering Scripture's clear statements concerning government's jurisdiction over crimes,[2143] a sure precept emerges: God has given to government jurisdiction over criminal matters; therefore, men are never to array themselves against government's rightful exercise of this jurisdiction. A question, however, yet remains: what are criminal matters according to Scripture? Answer: any action of government that falls within the scope of God's written grant of authority over criminal behavior; thus, any action of government claiming criminal jurisdiction that falls outside the scope of God's written grant of authority over a criminal matter is lawless. Government, then, is without right to exercise criminal jurisdiction (enforcement power) over matters to which God's Word written never accords clear criminal character.

It is incumbent upon each and all to determine that which God's Word written clearly includes in the category of crimes, as opposed to common-law torts and behavior merely objectionable to the majority or politically incorrect. Moreover, before the courts of men,[2144] only criminal acts driven by criminal intent amount to crime, but mere objectionable thoughts and intents, unaccompanied by criminal behavior never do. Confusion of crimes with torts, merely objectionable behavior, mere

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that is contrary to God's Word written, *neither may it so expound one place of Scripture that it be repugnant to another . . . .*" (emphasis added).

[2143] *See, e.g., Exodus* 20:13; *Deuteronomy* 5:17, 21:1–9, 22:23–25, 25:1–3; *Numbers* 35:33; *Leviticus* 24:17, 21; *Numbers* 35:16, 21, 30–31.

[2144] By distinguishing between Day of Man and the DAY of the LORD, Scripture distinguishes between this present day of man's flawed attempts to administer justice and the coming time of the LORD's flawless judgments. The courts of men—to have any opportunity to achieve justice—require objective evidence of outward behavior; the Court of the LORD does not. See generally app. 31 of this book (illustrating from Scripture the difference between the Day of Man and the DAY of the LORD). The coming Court of the LORD, however, will include objective evidence that men will see, understand, and know that God is just in His judgments.

For the courts of men, therefore, to hold men criminally liable for mere emotions, desires and thoughts, and words, unaccompanied by criminal acts, is without divine authority and, thus, usurpation upon God's prerogative. By contrast, the *jurisdiction* of God's Court (called the *Kingdom* of Heaven), upon coming to earth, will hold men criminally liable for wrong emotions (*Matthew* 5:22), wrong desires and thoughts (*Matthew* 5:27–28), and wrong words (*Matthew* 5:22)—though merely idle (*Matthew* 12:36). Consonant with Scripture, the common-law tradition requires objective proof of the existence of criminal intent in order to prove that the act of the accused is a criminal act. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 63–114 (1987), for discussion of the two common-law elements of a crime: *actus reus* (act of guilt) and *mens rea* (mind of guilt).

words, and thoughts swells the power of government to lawless proportions, creates a consuming criminal-law industry, burdens our country with unbearable costs, and reeks upon individuals and families untold misery.

Some lament that our country treats as non-criminal that which Scripture declares criminal. Even greater harm comes, however, from exacting criminal penalties against that which Scripture disapproves, but never declares criminal.

19
God Magnifies His Word Above His Name

The common-law tradition, consonant with Scripture, holds law to be eternal. For example, Scripture identifies Christ as the eternal God and the eternal Word; John introduces the subject of his Gospel Jesus Christ with, "In the beginning the Word continued existence; and the Word continued to be with God; and the Word continues to be God."[2145] In this verse, the Greek imperfect verb is emphatic: i.e., identification of Jesus Christ with the Word and with God continues uninterrupted from eternity past until the present, and will remain uninterrupted for eternity future. John's unfolding testimony supports his opening proposition: God the Word (*'ο λογος: ho logos*) is the eternal Christ. Being God in human flesh, Christ has limited Himself to human proportions and subjected Himself to His written Word in perfect obedience.[2146]

Moreover, God has lifted His Word equal to, or above, His name. "You have magnified your Word," the Psalmist writes, "above your entire name."[2147] Regardless of how one understands these words within the range its words and grammar afford, the result remains inescapable: God demands respect for His Word at least as great as God's demand of respect for Himself.[2148] Further, this verse captures the attitude of Jesus Christ toward the Word of God written,[2149] resting for its meaning upon

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[2145] *See John* 1:1

[2146] Though Christ is God confined to a human span, His wholly divine character remains without limit. Although He chose to experience the depravations of human existence, His absolute perfection in body, soul, and spirit remain unblemished. Moreover, since Christ was and is in perfect obedience to the Father, He has experienced perfect preservation from physical and spiritual disease. The death Christ suffered at the hands of sinful humanity was by His volition. In every respect and at all times, Christ retained, and still retains, His divine potency, which He will reveal in His time.

[2147] *Psalm* 138:2.

[2148] *See* GESENIUS' HEBREW GRAMMAR, *supra* note 152, at 383–84.

[2149] *See Matthew* 5:17–20.

the force of the Hebrew prepositional phrase *al-cal-simaca*: "above your entire name."[2150]

In this verse, the true translation of the Hebrew preposition *al*[2151] is "over" or "above"; some suggest, "equal to" or—as the New American Standard translation puts it—"according to your entire name." Where a Hebrew term admits of two possible meanings, says Hebraist Richard Rigsby, and both meanings fit the context without contradiction, the writer intends both meanings in their full force, each complimenting and enforcing the other. Such intended dual meaning reveals mystery, but never works contradiction. If, however, contradiction is unavoidable, the translator must then chose the meaning that best advances the movement of the passage.

Thus, *Psalm* 138:2 bears two complementary meanings: God has magnified His Word equal to Himself (because it carries His entire authority and power) and above Himself (because He has chosen to subject Himself to His Word by never violating its precepts and by keeping His promises). To the ancient Semitic ear and mind, these two meanings of the preposition *al* (*over* or *above*, and *equal to* or *according to*) compliment and amplify one another.

To interpret Scripture aright, the reader whose mother tongue is English, must consider the ancient Semitic readiness to view words as diamonds: as one turns the gem, the faces sparkle with complimentary meanings. If the interpreter, however, refuses to recognize the author's plural meanings, he forfeits understanding and leaves himself only three options: take the term as an intended riddle and irresolvable, choose one meaning and disregard all others, or attempt to reconcile the meanings by compromising one or more available meanings of the term in order to preserve his pet interpretation.[2152] By these three faulty responses, the interpreter will cripple the full force of the Hebrew author's intent.

[2150] Hebrew: על־כל־שמך.

[2151] Hebrew: על.

[2152] Among professing Bible believers, this third error is pervasive not only with words, but also with passages of Scripture that give different senses to matters that are uncontradictory but appear inharmonious. The interpreter following this error concludes either to use one passage to weaken the impact of the other or to use one to negate the other. Both choices compromise the force of the text. The right approach, however, is first, to show how the compatibility of the two passages preserves the full force of each. Second, where the interpreter fails to do this, he must acknowledge a mystery and then show that no *contradiction* exists between the two passages, i.e., that one passage does not present as true a fact or facts that the other passage presents as untrue at the same time and in the same relationship. When pondering evidences to determine facts, courts often fail to distinguish between apparent inconsistencies and contradictions. See generally REUBEN ARCHER TORREY, DIFFICULTIES AND ALLEGED ERRORS AND CONTRADICTIONS IN THE BIBLE (1907), for examples of the proper method and analysis in cases of apparent inconsistencies and apparent contradictions.

When, however, the interpreter follows the intent of the writer by accepting all of the term's non-contradictory and sensible meanings, he reinforces orthodoxy.

The writers of Scripture also use this Semitic literary tool of intending a word to convey more than one meaning by compounding Hebrew prepositions into one term—an advantage unavailable in the French, English, and German tongues. By compounding two or more Hebrew prepositions[2153] the writer defines more closely and fully, the relationships of the objects in view: again, the writer intends the meanings of each prepositions, each in all its force:

> French, as well as English and German, can only emphasize *one* of the two combined prepositional ideas; thus, such expressions as, *il prend le chapeau sur la table*, German and English *er nimmt den Hut vom Tish*, *he takes his hat from the table*, all regard the action from one point of view only; the Hebrew here [in the foregoing examples] brings out both aspects of it by means of [two prepositions conjoined] מעל־ *from upon*, cf. e.g. Is 6:6.[2154]

Psalm 138:2 teaches that to respect and obey God's Word is to respect God. Moreover, demanding that men keep His Word, God promises that He also will keep His Word. In a word, God has chosen never to break His promises[2155]—doing all He has promised to do and forbearing to do that which He has promised not to do. Thus, God holds His Word in dignity equal with his name; by subjecting Himself to keeping His Word, He has elevated it above all that He is. Further, because God has promised to keep His Word, men must take care that human expressions of law are consonant with that Word.

[2153] A preposition denotes the relationship between objects, concepts, or things spoken of according to their positions relative each to the other: for example, the plate is *on* the table; the shoes are *under* the chair; his mind is *on* his business; his interest is *in* baseball; the ensign is *under* the authority of his captain; the chairman presided *over* the meeting; my arrival was *around* noon; ideas come *from* the mind; and, thy will be done *on* earth as it is *in* heaven.

[2154] GESENIUS' HEBREW GRAMMAR, *supra* note 152, at 377–78.

[2155] *See Titus* 1:2. God has gone further by swearing "to His hurt" that He will keep His Word. *See Psalm* 15:4 (King James). Young has, "He hath sworn to suffer evil, and changeth not." Though wooden, more to the letters, it reads, "He is sworn [נשבע: Niphal, passive, i.e., He has subjected Himself to the oath's potential penalty] to [suffer] the evil [לְהָרַע] . . . ." The use of the Hebrew definite article ה (*hay*) with the preposition ל (*lamedth*), "to *the* evil," is equivalent to the third person possessive: "their evil." Christ has sworn Himself to our good by subjecting himself to suffer the evil we deserved, followed through with this commitment, and thereby gained the victory for Himself and for those trusting in Him.

20
Dynamite:
Controlled Power –*vs*– Uncontrolled Power

True Christianity recognizes that salvation is of Christ alone. Thus, men are unable, individually or collectively, to add efficacy to the life and works of Jesus Christ, the only mediator between God and man. Further, God alone provides the *potency* that enables steadfast moral intrepidity: the potency of the Holy Spirit. The story of Alfred Nobel's invention of dynamite illustrates the meaning of the Holy Spirit's potency. Alfred Bernhard Nobel (1833–1896)—Swedish military industrialist, capitalist, inventor of the land mine, producer of dynamite, improver of artillery, and establisher of the Nobel peace prizes—discovered how to tame nitroglycerin into a product safe for use. Desiring a name for his discovery that set forth its attributes, Nobel chose *dynamite*: transliterated from *δυναμις* (*dunamis*), the Greek New Testament term for *potency* or *potential*.

Ascanio Sobrero (1812–1888), a now unknown Italian chemist, had discovered the detonating force of nitroglycerin when, upon isolating the substance, he placed a single drop of it on an anvil. Then, holding a hammer by the end of its handle, he gently let fall the hammerhead on the drop; the resulting detonation[2156] blew the hammerhead off the handle. Terrified and unwilling that any use his discovery for evil, he determined to keep it secret, but to no avail: Sobrero's fellow student, Alfred Nobel, learned of the detonation and of nitroglycerin's unprecedented power. Nobel, seeing potential for profit, soon founded a small production plant in Heleneborg, Sweden and began producing and selling nitroglycerin. Nobel's plant and business, though profitable, was costly in human life: on 3 September 1864 a detonation at Nobel's nitroglycerin plant killed his brother, crippled his labor force and endangered Heleneborg. The city responded, allowing Nobel to continue production only on a barge anchored a safe distance from shore.

The potential of force in even small amounts of nitroglycerin was beyond human comprehension. It was near impossible for his customers, now worldwide, to grasp its acute volatility. Real respect for detonating force occurs only through sensual perception, i.e., experience: one must

[2156] *Dunamis*, as used to denote high explosives, signifies the instantaneous force of *detonation*, the pyrotechnic term for the category of rapidest burning or combustion (the rate at which a solid or liquid transforms into a gaseous state upon ignition). Any solid or liquid substance that transforms into a gas at over 25,000 feet per second is termed a detonation. Gunpowder, for example, burns at a slower rate; its combustion is therefore termed an *explosion*. Examples of even slower rates of combustion are the burning of wood and, slower yet, the oxidation or rusting of iron.

see, hear, and feel its power. At that time, nitroglycerin's instability and the force of its detonation, although terrifying, was yet unknown to all but a few chemist and those working in Nobel's plant. Consequently, Nobel's customers—miners, quarrymen, and teamsters—, seeing that nitroglycerin was an oily substance, in innocent ignorance rubbed excess amounts into their leather boots for water proofing and applied it to wagon axles for lubrication, both with devastating effect: loss of life in mining operations worldwide mounted and sales fell.

The problem with nitroglycerin was not any lack of force to accomplish its intended purpose—there is more focused power per square inch in a drop of nitroglycerin than any practical amount of gunpowder delivered—, but rather that its power is hard to control. Nitroglycerin is hypersensitive to physical shock; thus, release of its power is unpredictable. Consequently, Nobel's nitroglycerin buyers returned to the familiar and controllable pushing power of gunpowder.[2157] At length, Nobel, working to recapture the market and his profits, discovered the secret that made nitroglycerin safe and popular: saturating diatomaceous earth (an inert, absorbent, and siliceous sedimentary rock) with nitroglycerin renders it inert to most anything but ignition through a proper fusing with a blasting cap. Nitroglycerin-soaked diatomaceous earth tolerated jostling and even dropping without detonating. Nobel called his new mixture *dynamite*, after the Greek term *dunamis* because it held unfathomable *potential* power, releasable only by fusing at the will of the blaster.

Used in the New Testament, *dunamis* signifies unlimited *potential* power: potency under control, non-volatile, and manifest only at the will of the holder. *Dunamis* is a stable power held in steady reserve and under restraint, releasable at the proper time and place, and only for the proper purpose. This immeasurable, but controlled, power spoken of in the New Testament is the force of the Holy Spirit manifested through God's people at God's good pleasure.

[2157] Pyrotechnic science distinguishes explosives, which produce *explosions*, from high explosives, which bring *detonations*. Contrasted with a detonation, an explosion converts solid or liquid substances to a gas slow enough to provide a pushing effect: gas expansion from an explosion allows objects to be pushed away by the expanding gases without being obliterated. Quarryman and underground miners, therefore, use explosives where massive amounts of rock must be moved by pushing so as not to scatter the rock all over the quarry or, in the mine, so as not to shatter the rock into pieces too small to examine for valuable minerals. Detonations, on the other hand, convert solid or liquid substances into gas so rapidly that adjacent materials, not having time to move away from the speed of the expanding force, are obliterated or cut, especially if the force of the detonation is focused in one direction. Therefore, to cut steel supports when felling buildings and bridges, blasters use *high explosives*, focusing the direction of the force toward the object he wants to cut. Alfred Nobel named dynamite after the Greek term *dunamis* to signify that its power is under the user's control is.

21
Man's Revenge –*vs*– A Sober Reckoning

Tenderness should always prevail in criminal cases; so far, at least, as to take care that a man may not suffer otherwise than by due cause of law; nor have any hardship done him, or severity exercised upon him when the construction may admit of reasonable doubt or difficulty.[2158]

Practical problems grow from false ideas. During the early nineteenth century, certain Christian groups initiated the American penitentiary system using a false understanding of the fallen nature of mankind. These groups believed that there exists in every individual a spark of good ample to overcome his evil inclinations, if given proper opportunity. They further argued that if government will but lock a convicted criminal in a room with a Bible—a place dedicated for penance (penitentiary)—the spark of good nature already in him will ignite a flame, moving that man to do penance, reform his thinking, and change his behavior from a life of crime. These notions were the unfortunate outworking of Pelagius's[2159] doctrines in American life and government.

The penitentiary system soon evolved into something much more intricate, overreaching, and costly than its initiators had foreseen: it has become a major industry that now sucks life and hope from the country. Having failed in its purpose of reform, its false theology long forgotten, the system now perpetrates even more-egregious error by focusing men's minds on vengeance, instead of on compensation to those wronged, reckoned according to damage done. Vengeance, however, belongs to God alone; therefore, God's prophet instructs those of our courts, in this day of man's administration of justice, to pursue three requirements: do justly, love mercy, and humble yourself to walk with your God.[2160]

[2158] HEWARD, *supra* note 386, at 61. Judges prone to demeaning comments toward the accused, whether after or before conviction, ought to heed Mansfield's words.

[2159] The civilian Pelagius (d. *circa* A.D. 431) wedded himself to the conviction that man, through his reason, is able to conform his life and behavior to God's requirements without God's intervention; therefore, said Pelagius, *man may free himself* from sin's slavery (by bootstrapping, i.e., becoming his own deliverer) and then achieve moral perfection. As a matter of law, however, a chief fundamental of slavery is that the enslaved is without either legal standing or right of power to free himself. Freedom from slavery requires the intervention of a liberator. He who the Son frees is truly free; freedom by any other manner is deception.

[2160] *See Micah* 6:8. The entire verse reads, "He has made it obvious to you, O man [אדם, '*Adam*: mankind]: What is goodness? What then is the LORD seeking from *you*? It is achievable, if [כי ים: *key* '*im*] you do justice, and love mercy, and humble yourself to walk with your God." This verse comprises the principles of God's administration of government among men. It presents *goodness* (טוב: *tov*) as the result of following God's methods and processes of government (משפט: *mishphat*), coupled with mercy (חסד: *kesedth*) as the

First, courts are to do justice: courts must fairly calculate (reckon) the penalty to approximate the magnitude of the wrongdoing or crime, and never act in a spirit of revenge. Vengeance is never about making the wrongdoer right his wrongs; it is about getting even by making the wrongdoer suffer, and often goes further than evening the score. If, however, vengeance becomes the focus, men and courts usurp the place of God. This does not mean that God never uses men—even without their understanding or consciousness—to wreak His vengeance upon His enemies.[2161] It does mean, however, that the wrath of man never works the righteousness of God.[2162] Courts (judges and jurors), therefore, must mete out mercy and justice in fear and trembling, with an eye toward two attainable aspirations: fair play in the processes of law, which will result in substantial justice in the judgment or verdict.

Second, courts are to love mercy. This means that the judge, when pondering whether the party responsible has carried the law-imposed burden of proof respecting any issue, must error on the side of insuring due process;[2163] moreover, the juror's decision must resolve any reasonable doubts in favor of the defendant. Mercy is necessary because human judges and jurors are less than omniscient and, thus, prone to mistakes of grave consequence.

It has been the policy of the common law's criminal penalties to discourage crime and seek fair compensation for the injured party, never to wreak man's vengeance. To illustrate, a proper English lady tourist,

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means. The Hebrew phrase כִּי־ אִם (*key 'im*: except or "if") connects the means and the result in a cause-and-effect relationship between what God desires and the only way to achieve that desire.

God's methods of administering government (*mishphat*) and the love of mercy (חסד: *kesedth*, incorruptible compassion) grow out of humbling one's self to a steady walk with one's God. In this verse, משפט (*mishphat*), translated *justice*, connotes certain "administrations of justice." To the ancient Hebrew, it denoted the proper ordering of relationships among the three offices of government: legislative, judicial, and executive. Consonant with Scripture, this ordering includes the common law's separation-of-powers. See generally app. 3 of this book (expositing משפט: *mishphat*, the Hebrew term signifying the relationships among and between the three branches of government, and the manner of their administration).

[2161] *See generally* ALEX DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835) (evaluating America's penitentiary system and other aspects of America in the 1830's). De Tocqueville (a wealthy French aristocrat still in his twenties) and Gustave de Beaumont came to America to study America's penitentiaries, a recent American social innovation, and provide their report to the French government. Their report, *On the Penitentiary System in the United States and Its Application in France* analyses the operations of the penitentiary system just then emerging in America.

[2162] *See James* 1:20, "For the wrath of a man does not work [*εργαεται* (*ergeidzetai*): middle indicative, "effect steady practice of"] the righteousness of God."

[2163] See generally § 5.1.5.3 of this book (defining Anglo-American common-law due process). See further app. 24 of this book (discussing the inquisition of Jesus Christ as a biblical example of due-process violations driven by unbridled judicial passion).

traveling through rural parts of the American West was aghast upon learning that in times past courts had sentenced horse thieves to hang. Believing these hangings were acts of vengeance, she expressed her disgust to a local judge. "Madame," he replied, "please understand: our courts never hung men for stealing horses. Rather, they hung horse thieves that horses be not stolen." Regardless of vengeful feelings any may have had, it has never been the policy of the common law to execute men for stealing horses, that is, never foremost to cause the wrong doer to suffer, but rather to discourage wrong doing such as, in the foregoing example, horse thievery.[2164]

Now called correctional facilities, penitentiaries have entrenched leach-like in the United States. At most, however, prisons must be for removing those from among us that pose immediate danger, never for removing the harmless that are merely objectionable or distasteful in act, or speech, or thought.[2165] Put another way, incarceration must never be for those of whom the majority dislikes, but for that one proven dangerous. Incarceration must never be an exacting of revenge but a sober reckoning.[2166] Human revenge, whether sought by a private party,

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[2164] The Englishman that knows the history of England's criminal law will not be aghast that in some territories of North America during the eighteenth and nineteenth-centuries horse thievery was a capital offence. In late eighteenth-century England, petty stealing of value over 40 shillings was a capital offence. One such capital trial involved the theft of a gold trinket:

> Lord Mansfield directed the Jury to find a gold trinket, the article stolen, to be of less value [under 40 shillings], whereupon the prosecutor was indignant and said "Under 40 shillings, my Lord! Why the fashion alone cost me more that double the sum." Lord Mansfield retorted "God forbid, gentleman, that we should hang a man for fashion's sake."

Id. at 59. In 1777, William Dodd, a well-known English divine of good reputation, on a single occasion succumbed to the temptation of his extravagant tastes and committed forgery. But on quick advice of his victim's solicitor, Dodd straightway confessed and made full restitution. Nonetheless, contrary to great public outcry, the King denied Dodd's application for reprieve; on 27 June 1777, Dodd was hanged at Tyburn. *Id.* at 59–60. *See generally* James Bronson Reynolds, *Proposed Reforms of American Criminal Law*, 32 YALE L.J. 368 (1923) (providing examples from seventeenth and eighteenth-century England of hanging for petty theft). "Mere children were hanged . . . A law existed to the effect that anyone who lifted an article from a counter with intent to steal should be hanged." *Id.* at 368. Case by case, the English Jury and judges refused to convict; in time, the government abandoned prosecution.

[2165] According to Prison Fellowship International, at present, approximately 23 million Americans are behind bars; over 60% of these are incarcerated for non-violent offences. The incarceration rate in America is five times greater than in Britain and six times greater than in Canada.

[2166] All things are permanently laid bare before the eyes of Him to whom one's final reckoning must be had. *See Hebrews* 4:13. The writer to the *Hebrews* denotes this "reckoning" with the phrase *ο λογος* (*ha logos*). According to *John* 1:1, Christ is *ha logos* (the Word), to whom all must individually answer, i.e., give an accounting. Further, Christ

juror, or judge, usurps God's prerogative; it is the civil law's *lex talionis*, allowing the avenger to exact flesh, pound for pound, in return for wrongs done.

God intends the human administration of justice to work the love of God; only obedience to God achieves the love of God. "For this is the love of God," writes John the apostle, "that we keep His commandments . . . ."[2167] As respects mankind, the love of God is only in acts of obedience, when individuals and courts act in accord with God's Word. Scripture flatly enjoins man from vengeance. One is to seek biblical principles in establishing safeguards of criminal procedure in order to discourage man's revenge; to seek such principles is also in keeping with the common law. The common-law tradition is consonant with the Word of God as long as it focuses on setting matters aright and never on vengeance by shaming the wrongdoer. The common law's object is biblical: restrain lawlessness by administering the law's consequences, while respecting the dignity of the accused and the convicted.

22
The Lawgiver's Ultimate Jurisdiction

The term *lawgiver* denotes that one whose word another recognizes as a final judgment: one's final arbiter of right and wrong from which one has no appeal. Both Scripture and the common-law tradition recognize two species of a final judgment: *final judgments from which there are no appeal* and *final appealable judgments*.

Final judgments from which there are no appeal are understood in the context of two jurisdictions: God's unlimited jurisdiction over heaven and earth[2168] and mankind's limited jurisdiction in this present day of man's ministration of justice on earth. God's judgments are without appeal and, thus, final in the absolute sense: higher appeal is impossible.

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reckons His death, resurrection, life, and righteousness to the account of the individual trusting in Him. Put another way, Christ both delivers the reckoning (judgment) for sin and provides the remedy (His life) for His people's sin. *See also Ecclesiastes* 12:13–14. Therefore, whether in a military or civilian context, civil law's safe harbor of obedience to the state is the deceiver's delusion. All must still answer to Christ at the final judgment.

[2167] 1 *John* 5:3a.

[2168] God sets forth His jurisdiction by His written decrees revealing the LORD's DAY: the day of the Creator's exercise of judgment over His entire creation. The ancient Hebrews understood God's creation to consist of two parts: the heavens and the earth, expressed by the Hebrew phrase השמעים והארץ. This phrase appears in *Genesis* 1:1, and Scripture carries this divine division of God's universe throughout its pages. Christ refers to this division, claiming all authority "in heaven and on earth," i.e., God's entire creation. He also teaches His disciples to pray that the heavenly Father's will "be done on earth as it is in heaven." *Matthew* 6:10. See generally *Joshua* 2:11, for Rahab's admission of God's unlimited jurisdiction. See also generally *Jonah* 1:9, for Jonah's admission.

Man's judgments, on the other hand, are final and without appeal only in a limited sense. For example, the decisions of the United States Supreme Court are final judgments from which there is no appeal, only if one confines one's consideration of the legal dispute in question to the courts of the United States and excludes "the Supreme Judge of the world."[2169] A final appealable judgment, on the other hand, is the last act of a lower court that settles the rights of the parties. A final appealable judgment is final in this sense: if neither party appeals it—or appeals it without success—it remains final.

Scripture speaks of those tasked with delivering final appealable judgments, whether to higher courts of men or of God, using two noteworthy terms: '*elohim*[2170] in the Hebrew Old Testament and *θεοι* (*theoi*) in the Greek New Testament. The plural noun *'elohim* (gods) denotes both God as Judge and men appointed to judge, whom God has charged to receive His Word, to discern its particular application, and to deliver right judgment.[2171] Though Scripture uses '*elohim* to signify both God and men as judges, Scripture further distinguishes the Creator God as Judge from human judges by three characteristics: God is the only Lawgiver able to save and destroy,[2172] the only Judge able to destroy[2173] both body and soul in hell, and therefore, the only Judge worthy of man's fear and trust.[2174]

Theoi, being the New Testament translation of the Hebrew *'elohim*, is also a plural noun, meaning *gods*.[2175] Therefore, the meaning of *final judgment*, as a scriptural and as a common-law concept, depends upon the particular judgment to which the speaker or writer refers: man's appealable judgments or God's judgments from which there is no appeal. Further, *lawgiver* in Scripture signifies one responsible for making ultimate final judgments: judgments without possibility of appeal.

In the New Testament, James the apostle gives accurate expression to "lawgiver" by including the term's distinguishing attribute, the power of final, unappealable judgment—*νομοθετης και κριτις* (*nomotheteis kai*

[2169] THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). England's Crown, having shut out their American colonies from any fair hearing before the Jury, by (among other lawless techniques) the Crown's substitution of admiralty jurisdiction for common-law courts, the signers of the Declaration appealed to the Creator.

[2170] Hebrew: אלהים.

[2171] *See Psalm* 82:6.

[2172] Greek *απολεσαι* (*apolesai*). *See, e.g., James* 4:12.

[2173] Again *apolesai*. *See Matthew* 10:28.

[2174] *See id.*

[2175] See *John* 10:34–35, quoting *Psalm* 82:6, where John the apostle uses the Greek *theoi* to translate the Hebrew *'elohim*, signifying men as judges drawing from the principles of God's Word written to discern and deliver its particular application.

kritis): "lawgiver *and judge*."[2176] In Scripture, in history, and in truth "lawgiver" is not merely legislator, but also final judge. That one having final unappealable power of interpretation and application of law in particular cases—i.e., final say—is lawgiver.

Because James has written his epistle to Hebrews—the twelve tribes scattered abroad[2177]—his reference to "lawgiver" is best understood in light of the Old Testament term traditionally translated "lawgiver": *khaqaq*,[2178] stemming from a root denoting that which one intends to make permanent by scoring or engraving in metal or stone.[2179] By this word picture, God, as lawgiver, typifies His judgments, as though etched in stone; thus, men will never rub them out. God's judgments are unchangeable because there is no higher authority; appeal, therefore, is impossible.

Earthly Courts' Jurisdictional Limits

False religion comes from Babylon; thus, its gist and aim is Babylonian: to seduce a people into accepting laws and government coextensive with its system of false religious scruples in every detail, leaving nothing to individual discretion, including state invasion and control of the individual's conscience. On the other hand, the Word of God and the common-law tradition limit the reach of human expression of law and government into the affairs of private relationships and deny state meddling with the conscience of the individual. Only actions falling into clear-cut categories of wrongs, according to nature and Scripture—never convictions, thoughts, and desires—that do real harm, warrant the jurisdiction and intrusion of governments and courts. Behavior not rising to such a prescribed level of harm and danger, even though otherwise contrary to God's character, never warrants government action. Scripture's principles set these limits; God never brooks unwarranted government meddling. Yet, civil law's traditional ideals claim the state's prerogative to meddle with those whose mere behavior, thoughts, or

[2176] *See James* 4:12, where some ancient manuscripts include the definite article: *ο νομοθετης και κριτις* ("*the* lawgiver and judge"). If James did include the article, his articular construction emphasizes the lawgiver's *identity* as the judge: i.e., it identifies the lawgiver and judge as the same person. If, on the other hand, James excluded the article, the anarthros construction stresses the lawgiver's additional *quality* as judge: the article's absence qualifies the lawgiver as judge. Each case yields an outcome harmonious with the other case.

[2177] *See James* 1:1.

[2178] Hebrew: חקק.

[2179] The Hebrew *khaqaq* denotes a finality of decree from which there is no appeal; that which is fixed and, for purposes of the writer's example or point, unchangeable, as though scratched in stone or metal.

ideas the state deems threatening to state power,[2180] or even merely offensive.

Further, Scripture and the common law's ideals warrant penalties only where the prosecution proves two conditions to have existed together in time: a real criminal act and motivated by real criminal intent. Either of the two standing alone falls short of a crime. Common law requires that the government prove malice of mind necessary to convict the accused of a crime. At common law, the criminal character of another's behavior is never proven by first ascertaining the malice of his mind using pure accusatory speculation, absent some outward showing of *willfulness*, that is, the knowing violation of a clear legal standard.

In any case, man's government on earth is without warrant to decree behavior criminal that is not morally criminal according to God's Word written.[2181] Scripture is clear: penalties for crimes and rewards for good behavior are never to be because of behavior, but *according to* (*κατα: kata*) behavior. In the courts of mere men, there is no crime without objective evidence of subjective intent.[2182] God's Word never intends earthly courts and government to right every wrong; neither is earthly government capable of such a task.

Law limits the jurisdiction of man's government on earth because only God's jurisdiction is total and because human incompetence limits man's jurisdiction in fact. For example, it is immoral to break one's promise, but only those promises supported by consideration are enforceable in the common-law courts; promises naked of consideration are unenforceable. Further, broken promises in a common-law country incur only a civil liability, never criminal penalties. Neither Scripture nor common law provides debtors' prisons. Further, though Scripture condemns divorce and drug abuse, it never imposes criminal penalties for these. Thus, because Scripture never gives to human government any right to exercise total domination over man's mind and behavior is, human attempts to usurp power beyond Scripture's warrant, creates burdens that outweigh any supposed benefit.[2183] Not only will

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[2180] Such notions are marks of civil law's tendency toward a total state, seen in modern administrative bureaucracies. These notions have also crept into our common-law courts.

[2181] *But see* Allard v. Selfridge (1925) 1 K.B. at 137 (per Sherman, J.) (holding that moral culpability or intrinsic criminal intent is unnecessary to establish a crime, but that Parliament makes behavior criminal by legislative fiat). According to the *Allard* court, intrinsic morality, or lack thereof, is irrelevant. *Allard* stands for a civil-law notion, not a common-law ideal. With *Allard*, Nevertheless, Joshua Dressler disagrees. Beginning his criminal-law treatise in the context of the common-law tradition, he states, "[T]he criminal law is rooted in moral values." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW vii (1987).

[2182] *See*, *e.g.*, 1 *Peter* 1:17, *Revelation* 2:23.

[2183] *See Matthew* 20:25, *Psalm* 8:6, *Genesis* 2:26. *See generally* MAINE, *supra* note 639, at 19 (attributing China's and Brahminical India's lack of economic progress during past

government never maintain such usurped power, it will trouble both itself and bring untold suffering to others in the attempt.

Consider, for example, American prohibition of alcohol and the recent so-called American war on drugs. Prohibition failed because the federal government, though marshalling massive force at unprecedented cost, proved incapable of enforcing that for which it had no authority. Moreover, enforcement attempts brought notorious death and destruction. Case by case, by constant veto, American jurors stopped government's failing destructive attempts to enforce prohibition. Though prohibition ended, the regulatory bureaucracies it begat and built continue to multiply themselves. Prohibition incited a federal lust for regulation and an addiction to the federal usurpation of state police power, turning our Constitution upside down.

Man's government, being limited in jurisdiction and in power, is incapable of enforcing legislation against all immoral behavior; it is, however, capable of enforcing legislation against that immoral behavior which Scripture places square within the jurisdiction of man's government. The complaint of the humanists against government enforcement of moral standards is that society cannot give legislative expression to morality: we cannot, they say, legislate morality. Their proposition is false, unless they intend to mean—albeit contrary to their words—that society cannot *enforce* morality once legislated. This, however, is also false: legislation against immorality, for example, such as treason, unlawful homicide, and theft are enforceable; governments have enforced laws against these immoral acts for centuries. Therefore, man's governments are fully able, and do, give legislative expression that distinguishes morality from immorality; further, man's governments enforce such expressions.[2184]

It is impossible, however, that a people will correct every moral breach by enacting and enforcing legislation against all moral breaches. The failed experience of American prohibition of alcohol affirms this inability. Fortunately, Scripture reveals those breaches of law that fall inside the jurisdiction of man's government on earth and those that fall outside. When government lacks authority from God's Word written to

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times to their civil law's unlimited jurisdiction). An unlimited (total) state unavoidably limits potential for individual discernment and contribution to a country's good.

[2184] The complaint that the government cannot legislate morality reminds the writer of his clients' oft spoken expression of surprise concerning some unlawful action government has taken, "The government can't do that." This response denies the obvious because government just proved that it can do that by having done it. The pertinent question remaining, then, is whether government has authority to have done what it did. Likewise, government can and does legislate both morality and immorality; the only question remaining is whether government has authority to do so.

exercise jurisdiction over a matter, but nonetheless does so, it forfeits authority and raises God's displeasure.

23
The Scriptures: The Ultimate Standard

No other book has been so chopped, knifed, sifted, scrutinized, and vilified. What book . . . has been subject to such a mass attack as the Bible? With such venom and skepticism? With such thoroughness and erudition? Upon every chapter and tenet? A thousand times over the death knell of the Bible has been sounded, the funeral procession formed, the inscription cut on the tombstone, and committal read. But somehow the corpse never stays put.[2185]

Until the advent of Wellhausen and the German rationalists, the answer to the question, Can I trust the Bible? was yes . . . After that, the answer was . . . You can trust human reason, but certainly not the Bible . . . From that point . . . Christianity ceased to be a religion based on divine revelation, but rather became a set of . . . religious views anchored in human reason.[2186]

The object of a person's faith determines what he reveres, and what he reveres, he will learn and cultivate in his mind, heart, and behavior.[2187] If the Bible is trustworthy, then it follows that all ought to revere its demands by building its principles in their minds, hearts, and behavior[2188] to be the worthy standard for discerning right from wrong.

[2185] BERNARD RAMM, PROTESTANT CHRISTIAN EVIDENCES 232–33 (1957), *quoted in* JOSH MCDOWELL, EVIDENCE THAT DEMANDS A VERDICT 23 (1972).

[2186] DAVE BREESE, SEVEN MEN WHO RULE THE WORLD FROM THE GRAVE 20 (1990). "Every Scripture is God breathed . . . so that God's man—having been fully equipped—will be outfitted for every good deed." 2 *Timothy* 3:16–17.

[2187] In 1 *Peter* 1:23, Peter the apostle infers that the Christian Scriptures are to individual faith what semen is to the female egg: it brings conception that inevitably brings spiritual birth, bringing forth a new creature. Peter uses *σπερμα* (*sperma*): the Greek equivalent to the English "sperm." Jerome (presumably) takes this view, translating Peter's term *sperma* into Latin with *semen*. *See Biblia Sacra luxta Vulgatam Versionem*. (Stuttgart: Deutsche Bibelgesellschaft 1984).

[2188] A related doctrine to the reliability of the Old and New Testament manuscripts is inerrancy. When theologians state that the Bible is inerrant, they refer not to its transmission through the centuries, but to its autographs (the original documents). Some object, however, that since the autographs are not extant, their perfection is not verifiable; therefore, the doctrine of inerrancy is useless. Such objection fails. If the autographs, however, contained errors, it must follow that copies of these originals contain errors; if, on the other hand, one shows that the autographs were inerrant, then copyists having transmitted an inerrant Bible to the present is possible. In any event, if God were interested enough to keep His Word from error during its recording, it is reasonable to infer that He will see to its accurate transmission and publication to contemporary mankind. Thus, it is said, only God can make a straight lick (the Word of God both written and incarnate), using a crooked stick (sinful mankind).

Moreover, conclusions founded upon abstract reason alone are unworthy of trust. Only that conclusion resting square upon good evidence is worthy of one's loyalty.[2189] The following points of evidence[2190] show that the Bible is the Word of God written and is, therefore, the reliable standard to determine what is worthy of one's time, attention, and loyalty.[2191] The following evidences and inferences are reasonable and understandable by any willing to study them. Acceptance of the conclusion the evidence demands will produce obedience of faith and its benefits.[2192] One must be wary, however, because one's understanding of the strength of the evidence without accepting the conclusion it demands will add to one's condemnation.[2193]

Truth of fact is the only valid point of beginning for reason, but revelation of truth will occur only as the Holy Spirit makes truth viewable to the individual under the light of the Spirit. Regardless of how or by what process the Holy Spirit brings a fellow to truth, acceptance of truth's revelation remains the only beginning point from which true reason can rightly stir and by which the discovery of further truth is possible.[2194]

[2189] Your faith, writes Paul, must not be in the wisdom of men, by their "persuading words of reason" (*πειθοις σωφαις: peithois sofias*); but in the "potency" (*δυναμει: dunamei*) of God, as declared by the Scriptures that "displays" (*αποδειξει: apodeiksee-ei*) His power. *See* 1 *Corinthians* 2:4–5.

[2190] In the spring of 1981, the late John Gerstner, by lecture, introduced the writer to the following points of proof. The writer has added, omitted, and rearranged some information, but has not altered the frame of Gerstner's presentation.

[2191] As the United States Constitution grants authority and limits the scope of the federal government's delegation to act (jurisdiction), so also the Bible is the court of last resort in granting authority and limiting the scope of conduct and thought. To discern these scriptural limits requires study, contemplation, divine illumination, and creative application to life's ever changing demands. The arts of liberty—foremost listening, but also reading, writing, and speaking, all gained by discipline—are the tools that enable such creative application.

[2192] Thus, *if* one does not (אל, *al*: conditional negation) lean on his own (i.e., private and abstract) understanding but, rather, trusts in the LORD and acknowledges Him, the LORD will straighten and level his road. *See Proverbs* 3:5. A crooked, rough road debilitates and discourages. Because "[t]he trail was bad . . . ," says Robert Service, "I felt half mad."

[2193] *See generally Matthew* 9:17 (Christ explaining to his disciples that He speaks in parables to conceal truth, thereby preventing the Pharisees's further understanding and unnecessary resulting condemnation).

[2194] *See generally Romans* 1:17–32 (demonstrating that revelation of truth to the individual is progressive, with truth building upon truth)). God reveals truth to the individual though a process of progression, which begins only as one accepts the undeniable evidence of God as creator of all things; and continues only as one accepts each subsequent illumination of truth by stepping forward into the light that truth). *See also* 1 *John* 1:7. For example, Scripture begins its written revelation of God as creator (אלוים: *'Elohim*); this first principle of is the truth upon which all further understanding of truth depends. In *Romans* chapter one, Paul's explanation of the process required for the progressive understanding of truth, is the Bible's commentary on Christ's words: "For whoever has, to him shall be given, and he shall have more abundantly; but whoever does not have, from him shall be taken away even that which he has." *Matthew* 13:12. The individual knows truth as he sees it, accepts it, and by obedience, proves (to himself) his belief in it. God progressively reveals

Truth, said Jonathan Edwards, accesses—by the light of God the Holy Spirit—a person though any one of the three components forming the whole of his personhood: body, soul, or spirit.[2195] Indeed, because truth is the only valid point of beginning for reason, Paul the apostle reasoned *from*[2196] God's Word.[2197] Moreover, to reason from the Scriptures is to reason from the source unadulterated by pagan thought.[2198] Evidence marshaled in a convincible manner helps the investigator to arrive at right and bolster his confidence in truth. Following is one such marshaling of both evidence and inference demonstrating the reliability of the Word of God written.

1. *No Merit Exists in a Claim Borne Out of Personal Preference*

At the outset, the sound investigator assumes nothing because any assumption made must be—by reason that nothing is yet tested and proven—arbitrary, and therefore, untrustworthy. Moreover, he must avoid so-called false arguments, that is, non-arguments. For example, some people and religious groups rest their conviction upon personal preference. They believe that particular writings are the Word of God because they have strong feeling that these writings are Scripture, or because they like the idea of having something to believe in and agree to what a certain author has said. In short, they feel certain, but without any

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His knowledge, step by step, as the recipient acknowledges each fresh revelation in faith: "For in it [the gospel] God's righteousness is revealed *out of faithfulness into faith* . . . ." *Romans* 1:17 (emphasis added).

[2195] See generally 1 *Thessalonians* 5:23. *See also generally* JONATHAN EDWARDS, A TREATISE CONCERNING RELIGIOUS AFFECTIONS (reprint 1959) (1746), for Edward's scriptural evaluation of the reasons for the Christian's deep-seated, heartfelt affections in response to the Holy Spirit's working. Edwards, made this analysis, while observing the emotional religious responses that accompanied the Great Awakening of the eighteenth century. Due to the wide-spread respect for Edward's opinions, both those offended by the emotionalism that accompanied the Great Awakening and those that were comfortable with it, looked to Edwards for approval. This brief work, therefore, remains relevant to a biblical view of the worth of emotional responses to God's grace.

[2196] Greek *απο* (*apo*), referencing the contact point at a thing, from which another thing begins to move. Thus, good reason always rests on fact and builds its steps of logic from that sure foundation. Thus, reason—as a building—is only as good as its foundation and the strength of the logical connections between its parts.

[2197] *See Acts* 17:2.

[2198] Cairns confirms the absence of Greek thought in the writings of the New Testament authors. "Certain well-defined characteristics appear in their writings. Their utterances are informal, sincere statements of sincere faith and piety and show little evidence of the philosophical training in pagan philosophy that one notices in the writings of Origin or Clement of Alexandria." EARLE E. CAIRNS, CHRISTIANITY TROUGH THE CENTURIES 77 (1979).

foundation of fact. Certitude, however, is never the test of certainty; "Cock-sureness does not make things so."[2199]

Thus, personal desire or preference is no sound basis for a claim. For example, mining claims cover some mining districts of western states much as the patch working covers a quilt. A few of these claims hold inestimable wealth; others are not worth the cost of a trip to the courthouse to file on them. "Gold," said the prospector, "is where I find it"; Samuel Clemens defined the run of miners as liars with holes in the ground.[2200] Merely because a man hopes gold to be at a certain place, his filing a claim at the courthouse without reliable evidence of gold deposits is no legal basis for a claim under the terms of the mining law. The law requires evidence of profitable deposits on the claim.

In the same way, a person's wanting to believe this or that book is without error and trusty in every way, premising his behavior on it, but without reliable evidence, is as fortuitous as staking a mining claim on land void of evidence of valuable minerals. There is no merit in a mere claim of value born out of one's deep desire or personal preference.[2201]

2. *The Bible Claims to Be Word of God*

It is said that Scripture states expressly or implicitly that it is the reliable Word of God some 3000 times. Because the Bible is God's Word, it is expected, and fitting, that it makes this claim. Moreover, as an evidentiary matter, absent good evidence to the contrary, these claims create a presumption that the Bible is the Word of God. The objective, honest observer will admit that no evidence has ever overcome this

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[2199] 2 HARV. L. REV. 40 (1918–1919).

[2200] Thus also the saying, *A mine is a hole in the ground with a fool at the bottom and a liar at the top*.

[2201] Belief is desecrated, said William James, when given to unproved and unquestioned statements for the solace or private pleasure of the believer. It is wrong always, everywhere, and for anyone, to believe anything upon *insufficient evidence*. God provides evidence from two sources, both of which the common law of evidence recognizes: tangible evidence from our environment (circumstances, occurrences, and things) and documentation (Scripture).

In 1995, the writer met Neil Armstrong, the first man to walk on the moon, in Cincinnati, Ohio following his presentation before the fiftieth-anniversary convention of prisoners of war of Stalag Luft III. Mr. Armstrong referenced his lunar experience; the audience accepted his claims without hesitation or question. John the apostle writes, "Since [ει (*ei*), indicative mood: assumes the premise is true. i.e., "in view of the fact"] we receive the witness of men, the witness of God is greater." 1 *John* 5:9. Thus, it is unreasonable to accept the naked claims of a man that he walked on the moon, while rejecting the evidences of the life, death, and resurrection of Jesus Christ. Fallen man, however, is prone to accept man's claims without corroborating evidence, especially when to not do so is to risk criticism. Tested against the common-law rules of evidence, the Word of God is a more-sure word than any words by man. See point 3 of this app. 23, *The Gospel Records Provide Historically Reliable Information*, and accompanying notes. *See also* 2 *Peter* 1:19, 1 *John* 5:9–12.

presumption. Nevertheless, in the event that the reader is convinced that he holds enough evidence to overcome the presumption of Scripture's claims to authenticity, in a spirit of fair play, the writer continues this offer of evidence.

3. *The Gospel Records Provide Substantially Reliable Information*

The records of the evangelists—Matthew, Mark, Luke, and John—are admissible testimony of the facts they record, constituting substantially reliable historical information. According to the common-law's ancient-document rule, the Gospel records carry a presumption of authenticity and reliability, and thus, are worthy of careful examination. "Every document, apparently ancient, coming from the proper repository or custody and bearing on its face no evident marks of forgery, the law presumes to be genuine. And devolves on the opposing party the burden of proving it to be otherwise."[2202] For documents meeting this standard, one is to resolve any doubt in favor of the document itself, not in favor of the critic. The four testimonies of the evangelists meet the forgoing standard of the common law's ancient-document rule; therefore, at common law, the burden shifts to the one denying the reliability of the Gospel records.

The earliest evidence of these four Gospels is a papyri fragment of the Gospel of John chapter 18, dated by all accounts about A.D. 100–115.[2203] John, therefore, wrote his Gospel testimony about A.D. 100 or earlier,

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[2202] SIMON GREENLEAF, THE TESTIMONY OF THE EVANGELISTS 7 (photo. reprint 1982) (1874). This common-law rule of evidence has stood the test of time, waxing even stronger since Greenleaf's day. *See* U.S. v. Kairys, 782 F.2d 1374 (7th Cir), cert. denied (1986).

Another common-law rule of evidence observed from ancient times, recognizes that when a declarant or witness speaks against his own interest, in all likelihood, he believes his assertions are true. The Bible's theme is consistent: mankind is worthy only of God's punishment, and only God's mercy and grace will spare him this punishment. In short, the writers of Scripture are self-condemning. Consequently, their testimonies are admissible evidence. The common law calls this principle *declaration against interest*; courts accept such statements as reliable, even when the declarant is unavailable for cross-examination, as is the case with the writers of Scripture.

[2203] This papyri fragment $\mathbf{p}^{52}$ contains *John* 18:31–34, 37–38. Kenyon, H.I. Bell, Deissman, and W.H.P. Hatch confirm this early dating. Deissman held that scribes copied $\mathbf{p}^{52}$ during Trajan's reign (98–117). Discussions that are more recent put $\mathbf{p}^{52}$ closer to A.D. 100 than to A.D. 125. The value of $\mathbf{p}^{52}$ is not that it varies from other manuscripts; it does not. Rather, its value is in its early date, establishing that John wrote his Gospel before the close of the first century. *See* PHILIP W. COMFORT, EARLY MANUSCRIPTS AND MODERN TRANSLATIONS OF THE NEW TESTAMENT 55–56 (1990). This fragment resides in the John Ryland's Library, Manchester, England. Some have dated it as early as A.D. 90; others have opined that scribes copied it as late as A.D. 125. In any case, all agree it is accurately dated somewhere near the beginning of the first century. "The apostolic ink," says Gerstner, "was hardly dry."

which supports the accepted tradition that John died a natural death, at well-over 90 years of age, following his imprisonment in exile under the reign of Diocletian (A.D. 81–96). Thus, John wrote his Gospel during the lifetimes of witnesses to the events of Jesus' life. For this reason, F.F. Bruce, of Manchester University, observed that competent historians have never seriously questioned the historical reliability of the Gospel records, but only theologians, holding antipathy to the supernatural.

Further, rules of evidence demand that accounts written during the lifetimes of witnesses to the events recorded enjoy the presumption of reliability, unless refuted by those witnesses. For example, since the author of the Buddha literature wrote several centuries after Buddha lived, none of the witnesses to the events the author alleged concerning Buddha had opportunity to object to the Buddha literature's accuracy. Historians, therefore, deem this literature unreliable. By contrast, the authors of the literature concerning the natural events concerning Mohammed wrote during Mohammed's life; no evidence exists of Mohammed's contemporaries contesting it. Historians, therefore, rightly presume this literature reliable, as to fact: Mohammed's place of birth and the events of his life following. So also, no witnesses of events the Gospel testimonies record, ever refuted the Gospels' accounts. On the contrary, contemporary historical literature such as, for example, the historian Josephus, affirm the historicity of the Gospel records.

Years ago, Merle Miller interviewed Harry Truman, then in his twilight years;[2204] Truman recounted in detail his meeting with General Douglas MacArthur at Wake Island. MacArthur's account of that same meeting, however, conflicts at some points with President Truman's account; only additional witnesses will resolve differences. The accounts purporting to establish the date of the official signing of the Declaration of Independence also conflict: some say 4 July 1776; others say 2 August 1776. Because Thomas Jefferson and John Adams each refuted the other's account of the true date, this question remains unsolved to many. In short, since available testimonies of the two foregoing events conflict, the accounts remain historically unreliable.[2205]

By contrast, historians readily rely on the record of George Washington and his men crossing the Delaware River at Trenton on Christmas Eve, 1774. An artist made the crossing famous by painting a picture of it with the color bearer holding the Stars and Stripes: an

[2204] MERLE MILLER, PLAIN SPEAKING 293–96 (1974).

[2205] The balancing of evidence between two opposing assertions is a necessary exercise. Unlike God, for man to have a fair opportunity to uncover inward truth, such as the thoughts and intents of mind and the heart, man must rely on objective evidence. The common-law courts, therefore, have fashioned rules of evidence, i.e., rules to measure the reliability of objective evidence.

inaccuracy because when Washington crossed the Delaware that night, the Stars and Stripes were yet unknown. Notwithstanding that artistic embellishment, historians accept the crossing as true because no Hessian, British, or American soldier, or any other witness or even contemporary, contested the happening of the event. For the same reason, historians hold the four testimonies of the evangelists historically reliable: no credible witness to the events the evangelists have recorded has refuted any detail of the Gospel records.

The testimonies of fact the four evangelists have recorded are now either verified by corroborating evidence or yet to be shown false. Further, the corroboration of facts referenced in these testimonies, says James Boice, grows year by year. As a result, at present, no one seriously questions the historicity of the Gospel records. The opinion of continental higher critics of the late nineteenth and early twentieth centuries—touted as "the assured results of scholarship"—that the Gospel records are unreliable, has proven false and quietly recedes, its voice now near undetectable. The facts testified to by the four evangelists, understood according to the common law of evidence and followed by simple inference, demonstrate the reliability of their testimonies.

Thus far, this offer of proof has shown that the Gospel records are substantially reliable. From the outset, this discussion has avoided arbitrary assumptions and false arguments and has rejected non-arguments, such as personal inclinations. Second, this offer noted that the Bible's claims of reliability and the presumption of authenticity of the Gospel records under the common law's ancient document rule, create a presumption of reliability ample to establish the Gospels as God's Word, absent stronger evidence to the contrary. This offer then observed that the historical information provided by the evangelists is substantially reliable: information acceptable to a reasonable investigator because no witness to the events the Gospel writers have recorded has challenged the truth of these testimonies.

4. *The Gospel Records Reveal That Jesus Did Things Which Only God, or Someone With the Power of God, Could Do*

If the testimonies of the four evangelists are substantially reliable historical data, they are worthy of serious consideration. Even a cursory reading shows that Jesus Christ did things that only God or someone with God's power could do, namely, miracles. Further, the miracles of Jesus Christ do not merely appear in the Gospel records here and there, but rather are the constant activity of Jesus Christ. Note especially, that

to accept these miracles as fact does not beg the question; it is not using the records to prove themselves because point number three above established that the Gospel records provide substantial historical evidence: i.e., the records are substantially true. To dismiss the accounts of Jesus' miracles is to dismiss the substantial part of the Gospel records.

The four Gospels provide substantially reliable historical evidence of the overwhelming supernatural activities of Jesus Christ. Indeed, the Gospel records do not merely punctuate Jesus' life with a few isolated miracles that the reader may reasonably dismiss as the writer's misperception or the excusable exaggeration of an overzealous witness. On the contrary, Carl Adams characterized the life of Jesus as a *blaze of miracles*. All of the Gospel records, and especially Mark's account,[2206] strike the reader with the indefatigable supernatural persistency of Jesus Christ, forcing a question upon the investigator: what was the source of Jesus Christ's power?[2207] It is reasonable to assume that no mere creature has power over Creation such as Jesus demonstrated in the Gospels. Therefore, either Jesus is the Creator or the Creator has granted Him that power.

[2206] Matthew, Mark, Luke, and John, the four evangelists, each emphasize a different aspect of Jesus' life because each one targeted one of four different groups of the Roman Empire's populace. Mark was Roman; in writing his Gospel he targeted Romans, whose motto was *Labor omnia vincit* (Labor conquers all things). Therefore, he wrote to show this target group the unflagging work ethic of Jesus Christ. Consequently, he riddles his short narrative with forty occurrences of *εθως* (*ethos*: "straightway" or *immediately*), emphasizing Jesus' diligence as a workman.

Luke authored only two of the New Testament's twenty-seven books: the historical narratives *Acts* and *Luke*. Nonetheless, these two books comprise, in pages, more of the New Testament than that of any other New Testament writer, including Paul, who wrote at least thirteen of the twenty-seven New Testament books. *Acts* and *Luke* amount to over thirty-five percent of the New Testament's volume. Luke's broad foundation of historic facts forms much of the foundation upon which the New Testament's theology rests.

As a young Oxford student, Sir William Ramsey recognized that Luke's historical records are fundamental to the Bible's theological conclusions. Noticing Luke's pervasive use of detail, Ramsey concluded that Luke, as with any precise historian, enlarged his opportunity for error. Ramsey reasoned that demonstration of error at any point in Luke's historical account, is to destroy Luke's credibility and justifiable reliance upon Luke's history at all other points, including Luke's Gospel.

Ramsey set out for Asia Minor to look into Luke's claims set forth in the book of *Acts* and to prove Luke unreliable. During the years 1880–1890 and 1900–1914, he explored Western Asia Minor and searched out its antiquities. Following these on-site investigations, Ramsey concluded that Luke's *Acts* is accurate in every detail. This conclusion strengthened the Church's faith in the *Gospel of Luke*: Luke's record of Christ's life and ministry.

[2207] Facing this inescapable question, Albert Sweitzer concluded that the Gospels present Jesus as a *super* (more than) natural being. *See generally* ALBERT SWEITZER, THE QUEST OF THE HISTORIC JESUS (1966).

5. *Jesus' Supernatural Power Establishes His Credit as the Proposer of True Doctrine*

Thus far, this offer of evidence has acknowledged the historical reliability of the Gospel records. From acceptance of this reliability, one justifiably infers that the supernatural activities of Jesus Christ provide credibility for his words. For example, John Locke said, "That divine power [made evident by Jesus' miracles] established Christ's credit as a proposer of doctrine."[2208]

Jesus' displays of divine power established His credibility in the eyes of men, making their unbelief increasingly inexcusable. Jesus' status as the very Son of God, however, qualifies Him to propose doctrine, regardless of whether he demonstrates His supernatural abilities before men.[2209] Nonetheless, for the sake of some and to silence distracters, Jesus establishes His credibility by displaying His supernatural power.

Having demonstrated the substantial historical reliability of the Gospel records in point three, a narrative from John's Gospel provides evidence that Jesus' power is innate, i.e., Jesus is divine. In *John* 3:1–21, Nicodemus, a member of the Sanhedrin (the Hebrew high court), fearing to be seen with Jesus, lest others conclude that he was Jesus' associate, approached Jesus at night.[2210] During this meeting, Nicodemus, speaking

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[2208] John Locke's loyalty to the reliability and even inerrancy of the Bible is noteworthy. His work on biblical theology has few rivals as an organization of scriptural data. In it, Locke makes few comments and allows the Word of God to speak for itself. Without apology, Locke exalts God's sovereignty.

One of Mr. Locke's relatives asked him the shortest and surest way for a young gentleman to attain a true knowledge of Christianity. Locke replied, "Let him study the Holy Scripture. Therein are contained the words of eternal life. It has God for its author, salvation for its end, and *truth without any mixture of error for its matter."* JOHN LOCKE, A COMMON PLACE BOOK TO THE HOLY BIBLE 16 (New York, American Tract Society 1856) (emphasis added). See further generally KIM IAN PARKER, THE BIBLICAL POLITICS OF JOHN LOCKE (2004), for a study of John Locke's lifelong preoccupation with study of the Bible, including his interests in biblical languages and his compiled rules of biblical hermeneutics.

During Locke's time at Oxford, John Owen was dean of Christ's Church; Owen's influence on Locke was significant. Calvinism was in fashion at Oxford and Locke heard two sermons daily, many of them from Owen. For example, Owen's biblical case for toleration of religious dissent left its mark on Locke, "Since the Bible did not advocate punishing heretics, neither should the Royalists or the Puritans." *Id.* at 10. For Locke's rejection of Deism, see John Locke, *The Reasonableness of Christianity* (1695), *in* 2 READINGS IN THE HISTORY OF CHRISTIAN THEOLOGY 83 (William C. Placher ed., 1988).

[2209] *See generally Matthew* 12:38–40 (asserting that the written Word of God is the strongest sign of Christ's authority and credibility because the Scriptures point to and reveal Christ's divine identity).

[2210] John's use of the genitive noun *νυκτος* (*nuktos*) connotes *sort* of time much as the Greek verb also indicates sort of action or *aktionsorte*. Nicodemus, concerned for his reputation with his fellow judges of the Sanhedrin, was careful to come to Jesus a "night kind" of time—i.e., under the cover of darkness—in order to avoid detection by his

for himself and the rest of the high court members, said to Jesus, "*We know* that you are a teacher come from God, for it is impossible that anyone do the miracles that you are doing unless God be with him."[2211]

Thus, Nicodemus acknowledged the obvious and inescapable conclusion that God, the maker of all things, is the source of all miraculous power. When Nicodemus's colleagues accused Jesus of receiving his miraculous powers from Satan,[2212] Jesus pointed out that Satan, though wicked, will never grant power to Satan's enemy: a "house divided against itself," said Jesus, "cannot stand."[2213] Jesus' enemies never rebutted the inescapable conclusion that Jesus' power must be divine. Thus, John Locke concluded, by revealing His divine power, Jesus established His credit before men as a proposer of doctrine.

6. *Jesus' Credibility Gives Finality to His Proposals*

By His miraculous works—demonstrations of authority over nature that suspended the usual course of nature's laws—, Jesus Christ established His credit as a proposer of truth. His proposals, therefore, take on special significance. Jesus proposed that both the entire Hebrew Old Testament and the rest of the New Testament yet to be recorded[2214] are the Word of God written. Moreover, Jesus affirmed the Hebrew Scripture's accuracy, validating even the serifs on the letters; His assertion is no hyperbole.[2215]

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colleagues who sat with him on the Hebrews' high court of last resort (the Sanhedrin). *See John* 3:2.

[2211] *John* 3:2.

[2212] *See Mark* 3:22–26.

[2213] *Matthew* 12:25, *Mark* 3:25.

[2214] See generally *John* 16:13, for the promise of this projected revelation to come. See also *John* 17:20, for evidence that Jesus expected the balance of the New Testament to be recorded.

[2215] *Matthew* 5:18. Jesus said no more than He literally meant. The serifs on these letters are at times the only distinguishing characteristic between those Hebrew letters and another. Confusion of serifs on the Hebrew square characters can change one word to another, thereby altering the meaning of a whole phrase. The square characters used in the first century were almost identical with the Hebrew characters used today. *See* GENESIS' HEBREW GRAMMAR, *supra* note 152, at xvi. This does not imply a hermeneutic that takes all the words of the biblical text as true because they are equally applicable in all circumstances; but rather, demands the hermeneutic that takes all words of the biblical text as equally true, as their application is viewed in light of the entire Scriptures.

The *jot* (meaning a small mark) is an English translation of the Greek '*ιωτα* ('*yota*). Because Matthew s Hellenized Hebrew readers of Greek readers, some ignorant of the Hebrew tongue, the evangelist uses '*yota* to transliterate the Greek letter *ι* ('*yota*) from the Hebrew י (*yodh*)—the smallest of the Hebrew letters. *Yodh* has remained the smallest letter in the Hebrew alphabet since the inscriptions of the first century A.D., but doubtful before that time. *See* GESENIUS' HEBREW GRAMMAR, *supra* note 152, xvii, tbl. *Early Semitic Alphabets*.

The *tittle* is a serif appended to the ends of parts of some Hebrew letters, transforming these into another Hebrew letter. Depending upon the presence or absence of the serif, the

Thus, said Henry Joel Cadbury, *if* a fellow follows the testimony of Jesus Christ, he must hold the Bible to be the inerrant Word of God.

7. *The Bible is Therefore Trustworthy*

One rightly frames this point as follows: since the Bible is the Word of God, it is reliable because God is neither capable of ignorance nor of lying. Neither Scripture nor history reveals such flaws in God's character; further, any argument that God is ignorant or untruthful is unreasonable as well as unthinkable.

8. *Acceptance of Jesus' Proposals Concerning Scripture Requires the Small Faith of Honest Acknowledgement*

Jesus Christ, the credible proposer of truth, claims the Bible to be God's inerrant Word. Acceptance of Jesus' claim, in light of the foregoing discussion, demands no great faith or piety but, rather, small faith based on unclouded, unbiased thinking, coupled with integrity.

9. *The Burden of Proof, Therefore, Shifts to the Objector*

Once the investigator accepts the foregoing points, the rules of evidence relieve the claimant from the burden of proof, placing it upon the one denying the conclusion that the Bible is the Word of God and is, therefore, reliable.

For example, having determined that the Bible is reliable, if two passages of Scripture appear incompatible, the burden to show their harmony shifts from the person asserting the Bible's reliability to the objector to show that these passages he claims are incompatible are incapable of harmony. Thus, the objector bears the burden of proving a negative.[2216] Nevertheless, if the one objecting shows irreconcilable

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letter ח (*kath*) becomes ה (*hay*), ו (*wow*) becomes ז (*zayin*), and ב (*beth*) becomes כ (*calf*). In certain instances, the transformation of a single letter by the presence or omission of a serif changed one Hebrew word to another Hebrew word, which altered the meaning of the entire sentence, thereby changing delivery of an entire thought. Jesus affirms the detailed inspiration of Scripture. To affirm the inspiration of the details is to affirm the inspiration of the principles.

[2216] The following analogy from the author's experience will aid in clarifying this point. When in the woods with his father or grandfather, mushroom hunting, going to check on the cattle, or walking fence, all kept their eyes peeled for a honey tree. Normally, bees build their honeycombs inside hollow tree trunks. Once however, just before the snow flew, down in the creek bottom hanging exposed on a low limb, Grandpa found a honeycomb about three-feet long, two-feet wide, and one-foot thick. Knowing that the bees, having built their comb unprotected from the cold, will soon perish, we built a fire, subdued the bees with

contradiction between those two passages, the crowbar he has used to pry that building block out of the Bible is enough to tear down the whole edifice of God's Word. On the other hand, no one has ever shown true contradiction between any two passages of Scripture.[2217] One, therefore, justifiably concludes that the entire Bible is reliable.

Though acquiescing in the evidentiary demand that the Bible is the Word of God and, therefore, trustworthy, some reserve a possibility that the Scriptures have errors of fact. They desire, out of respectful affection, to venerate the Good Old Book and allow it to retain its dignity, while refusing to take an unfashionable position. Their proposition would be: "The Bible is the Word of God, which is *un*reliable."

This proposition, however, is decayed at its core, but its descriptive terms hide its fault. To see its decay, one must pull away the descriptive terms and phrases. The phrase, *The Bible* . . . identifies "the Word of God"; the word *is* serves as the equating verb—both "the Bible" and "the Word of God" signifying the Scriptures. Thus, removing the phrase "the Bible is" leaves, "the Word of God, which is unreliable." One may next remove the demonstrative, "which," being redundant of "the Word of God," leaving, "the Word of God is unreliable." Finally, by removing the phrase, "the Word of," which signifies God's own manifestation of His purported unreliability, leaves: "God is unreliable." To propose that the Bible is the Word of God, which is unreliable, is to say that God is unreliable: an assertion unreasonable, unfounded, and unproven.

In the limited understanding of man, no amount of evidence in proof of any proposition achieves absolute objective certainty. Nonetheless, evidence of substantial and humbling certainty will justify one's belief and active reliance. Evidence and arguments showing the reliability of

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smoke to prevent bee stings and harvested the entire comb. In later years, the writer related this experience to a zoology professor. The professor denied that bees will build such an exposed comb, but the professor was mistaken and additional credible witnesses to the fact were available.

Over the centuries, the common-law courts have presumed that competent testimony is truthful, until impeached or overturned by contrary testimony. The writer's foregoing testimony was neither impeached nor overturned; therefore, the burden shifted from the witness to the professor to show that it is impossible for the bees to have built their comb exposed to the elements (an impossible task), or otherwise show it contradictory to the rest of nature. In the same way, when one demonstrates that two or more passages appearing contrary can be shown harmonious, the burden shifts to any objector to show how those passages cannot be harmonized—again, an impossible burden to meet. To follow these principles of evidence is to follow the true methods of science, viz., the scientific method. This method demands that the investigator move from what is known to what is unknown, not vice versa; from that which is best substantiated to that which is least substantiated. To reverse this procedure removes possibility of reliable conclusions.

[2217] See BERNARD RAMM, PROTESTANT CHRISTIAN EVIDENCES 232–33 (1957), *quoted in* JOSH MCDOWELL, EVIDENCE THAT DEMANDS A VERDICT 23 (1972).

the Old and New Testament documents is overwhelming.[2218] Strong inferences, as have been set forth here, are enough to persuade a reasonable person into at least further inquiry, if not confident reliance.

10. *The Bible: Standard for Truth*

If the Bible is without error and the court of last resort respecting all else, then any consideration of law and government must begin with a familiarity of Scripture. Man's great problem is not that he is unable to think, but rather, that he fails to use a sound standard to test his own or another's thoughts. Man, of necessity, interprets all things according to his conscience, whether informed wrong or right. If Scripture is the familiar force saturating a person's understanding, his view of the world will be God's view; he will interpret himself, his surroundings, relevant facts, and other writings according to Scripture, as the Holy Spirit of God gives light.

Although the foregoing presentation of proof is compelling to any that will sincerely consider it, compelling evidence alone falls short of insuring true and lasting persuasion. Nature and Scripture teach the distinction between offer of evidence and proof, and persuasion: the presentation of compelling evidence of a fact never insures the Jury's acceptance of that fact: proof alone will not always secure persuasion; something more is needful.[2219] Even though the evidence that the Bible is the Word of God is clear and compelling, only by the light of the Spirit can one accept the truth that the evidence demands. Moreover, the Spirit of God moves, translates William Tyndale, where He *listeth*,[2220] as does the wind.

Though proof of Scripture's authority bolsters confidence in the one willing to receive truth, the authority of Scripture never depends upon proofs and reasoning: the authority of Scripture is innate. The Bible, says B.B. Warfield, is not an inspired collection of books, but rather, is a collection of inspired books. Put another way, in consideration of the evidence and through reason, men have rightly recognized that the Bible is the Word of God. It is not this recognition, however, that is inspired; the Word of God is that which is inspired. The Bible is that out of which sound reason proceeds and upon which sound reason depends. The

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[2218] *See generally*, *e.g.*, F.F. BRUCE, THE NEW TESTAMENT DOCUMENTS: ARE THEY RELIABLE? (1991) (discussing the reliability of the New Testament manuscripts). *See also* W. GRAHAM SCROOGIE, IS THE BIBLE THE WORD OF GOD (1950). *See further*, B.B. WARFIELD, THE INSPIRATION AND AUTHORITY OF THE BIBLE (ed., Samuel G. Craig 1948).

[2219] Thus the saying, "To convince another against his will, leaves him in the same opinion still."

[2220] *See John* 3:8. *Θελω* (*thelo*): self-will, determination. *Listeth* is an old term for "lust." *Listeth* signifies desire, but does not carry the modern negative connotation of *lust*.

Word of God is the record of the thoughts of God given in the sentences of God, which, being higher than the thoughts of man, are more reliable.

24
Due Process –*vs*– Passions of Judges

Our law ought not judge the man, since we have not first heard from him, even to know what he has done.[2221]

The Sanhedrin, the Great Council of the Hebrews in Jerusalem, has provided a vivid example of the passions of magistrates thwarting due process. This Council had fashioned from Scripture's principles, both directly and by inference, every conceivable protection of due process for safeguards against wrongful conviction of the accused, exceeding even our ideals of constitutional of due process. Nonetheless, in their *passion* of envy[2222] to murder Jesus Christ, this Great Council of learned men ignored all of their established due-process restraints. Following is a list of the Sanhedrin's violation of due-process restraints, shared with our common-law, in its inquisition of Jesus Christ.

First, knowing their bias, while knowing the innocence of Jesus, the judges conspired to murder Him. *Second*, they took part in the selling of justice, paying Judas to betray Jesus into their custody. *Third*, they issued false warrant for Jesus' arrest, having no probable cause. *Fourth*, they arrested Jesus during the night, the law allowing arrests only between sundown and sunup. *Fifth*, they held their arraignment hearing against Jesus during the dark of night. *Sixth*, they employed false witnesses against Jesus to condemn Him to death. *Seventh*, they delivered Jesus to the Romans—whose jurisdiction they otherwise refused to acknowledge—to inflict torture, humiliation, and execution in a fashion contrary to their standards against cruel and unusual punishment. *Eighth*, to effect their passion, they blasphemed (the foremost charge leveled against Jesus), declaring: "We have no king but Cæsar."

All of the foregoing amounted to criminal abuse of process, but when Judas's guilt compelled him to return theses judges' bribe money, they,

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[2221] *John* 7:51. The law judges no man before it has heard (*ακουση: akousei*) him; nothing is more basic to due process. Nicademus saw that the others were judging Jesus Christ, not on the facts of what happened, but upon whether any other of the Jewish elite had accepted his claims. Their judgment was dependent; thus, the blind led the blind. Note well, Nicodemus held to a government of law and not men: eternal law is the judge of men; men are not the judges of eternal law.

[2222] *See Matthew* 27:18. *Envy* is the rottenest sort of hatred of one for another, due to some fact of another known, which generates a passion of lust to destroy.

with meticulous circumspection, refused to deposit those thirty pieces of silver in the Temple treasury because it was τιμη αιματος (*timay aimatos*): "blood money." Their refusal is a brazen example of legalism.[2223] No amount of established law and due-process restraints, in custom or writing, will hold back from evil the aggression of the one unpossessed by the Holy Spirit of God or otherwise externally restrained.[2224] Unless folk persist in demanding due-process limitations, constitutional due-process restraints in place for government and courts has proven inadequate to insure limited government.

25
Pure Reason:
Satan's Decoy

[N]either can any govern himself unless
his reason be lord, and his will and appetite her vassals;
nor can reason rule unless herself be ruled by God
and wholly be obedient to Him.[2225]

Only God knows the inner health of a fruit tree without that tree having yet yielded fruit and a man's inward faith without that faith having yet yielded good deeds.[2226] Satan, however, using words, manipulated Eve to believe that she, like God, never needs original evidence—an objective fact, perceived by one of the five senses—to discern truth:

> God knows that in the day you *both* [Hebrew plural: "you and your husband"] eat from it [the fruit], your [Hebrew possessive plural, "you and your husband's"] eyes will be opened, and you [plural: "both"] shall become God-like: distinguishing [*yada*:[2227] subjectively by intuition of one's reasoning power without outward, objective evidences, i.e., by pure reason] good and evil.[2228]

[2223] *See Matthew* 27:6.

[2224] See generally app. 2 of this book (discussing the ineffectiveness of well-crafted rights on paper to restrain the one blinded to those rights by passion).

[2225] RON HAYHURST, HOW TO INTERPRET HISTORY 82 (2007), *quoting* Hugo Grotius (also spelt *Huig de Groot* and *Hugo de Groot*) (1583–1645). Grotius, a Dutch Christian apologist, play write, and poet, labored to establish natural law as the foundation for emerging international law.

[2226] *See Genesis* 15:6.

[2227] Hebrew: ידע.

[2228] *Genesis* 3:5.

This verse uses the Hebrew terms *tov*[2229] (good) and *ra*[2230] (evil) to signify the ability to distinguish the opposite poles of built-in moral quality (viz., good and evil) without seeing outward evidence. For mankind to judge aright, however, he requires outward, objective evidence; by contrast, God's judgment does not. Only God knows (sees) the innermost thoughts and intents of one's heart without need of outward evidences.[2231]

The Hebrew term translated "distinguishing" in *Genesis* 3:5 is the common verb *yada*, often translated "know" and dozens of other ways in its seven Hebrew stems. Here *yada* appears in the Hebrew as a simple passive (Niphal) participle, which, in other places in the Old Testament, translates over a dozen related ways, depending on the particular aspect of this term the translator intends to stress. Here, *yada* means to accurately know by purely subjective means (i.e., without objective evidence), and thus, approving or disapproving what is moral (right) and what is immoral (wrong)—an ability unavailable to mankind. Human judgment requires facts: evidence detectable by the human senses.[2232] Put another way, man can know only that which is unknown or undetectable by that which he, or another, has seen, heard, smelt, tasted, or touched. In a word, he needs *evidence*:[2233] that which one's senses can perceive and which tends to make a relevant fact more or less likely.

Logic is a tool used for right and for wrong. At bottom, therefore, logic is not the flaw in the civil-law tradition, but rather, is a tool misused to perpetrate civil-law's false doctrines. As a young student at Pembroke College, Oxford, William Blackstone excelled at mathematics, thereby showing his affinity for logic. Though Blackstone appreciated the worth of logic, he also understood that one can follow the rules of logic to reach the wrong result. Thus, at the outset of his *Commentaries*, Blackstone acknowledges the civil law "as a collection of written reason" but "apart

[2229] Hebrew: טוב.

[2230] Hebrew: רע.

[2231] *See Hebrews* 4:12.

[2232] *See* ROBERT BAKER GIRDLESTONE, SYNONYMS OF THE OLD TESTAMENT 72–73 (photo. reprint 1981) (1897).

[2233] Common-law evidence, in its purest definition, is that which one's senses can perceive and which tends to make a relevant fact more or less likely to a juror's mind. The term *evidence* has survived long, coming into English from one of the oldest known roots in our language, first appearing in early Semitic, ancient Sanskrit, and then early Greek, using the now-discarded letter *digamma* (Ϝ). Pronounced like the English *w* sound, *digamma* was the first letter of the ancient root *Ϝid-* (pronounced *wid–*), meaning, "to see," as with the eyes. The English tongue has changed the *w* sound of this root to *v*, becoming *vid–*, the root of the English e-*vid*-dence: that which the eyes can see. This old root continues to do service as *vid-eo*.

from any binding authority" because " it is "calculated" to achieve "the despotic monarchy of Rome and Byzantium."[2234]

Peter the apostle appeals to his readers' reasoning ability as a defense against false knowledge or *intellectualism*: reason unfounded on real evidence of fact. Such *reason*[2235] of which Peter speaks belongs to those able to receive all relevant evidence, including the record of history in Scripture, thus, knowing, but ignoring (knowingly ignorant), the Noahic flood, says Peter, keep themselves in a state of denial of God's coming judgment. God has endowed the individual with the ability to reason so that he will fully use this gift consonant with divine revelation and in dependence upon divine providence. History and Scripture, however, reveal that pure reason—i.e., independent of divine revelation—is a decoy luring the unwary into futile dependence upon the naked human mind to solve his problems and settle his disputes with others.

Civil-law culture defines the civilized man as the one able to conduct logic in the academic environment—or the one submitting in obedience to those said to have such ability—, free of the two demands facts make upon reason: the framing of reason's presuppositions and the testing of reason's conclusions. "Civilized people," says Cicero, "are taught by logic, barbarians only by necessity . . . and the lesson is inculcated even in wild beasts by nature itself."[2236] Cicero is right in that civil-law world believes one can learn from logic, but fails to insure that logic rest on fact. Reason, however, sets man apart from the brutes only as man grounds reason in God's revelation of facts. Thus, Paul the apostle "reasoned . . . from the Scriptures."[2237]

[2234] 1 BLACKSTONE, *supra* note 12, at 5.

The end toward which civil law progresses (its purpose) reveals the end from which it proceeds (its presuppositions); though the logic built upon its presuppositions, taken in the abstract, seems right, the purposes behind it are wrong. "There is a way seeming right to a man," says Solomon, "but back of it [אחריתה (*'acaretah*)] are the *ways* of death." *Proverbs* 14:12. Error leads to death in many ways, but it is always the same death. In this Hebrew text, verses 14:12b and 14:13b stand in parallel poetic structure, placing both instances of *'acaretah* in the same structural position, thus intending the same meaning: "a result coming from behind." The death resulting from the ways of error sneaks-up on a fellow from behind: it catches up with him.

[2235] *'Ηλικρινος* (*eilikrines*). *See* 2 *Peter* 1:1–2. Peter's term joins two Greek terms: *κρινος* (*krinos*: discernment) and *'ηλιος* (*helios*: light of the sun), thus signifying discernment of all relevant evidence in the clear view of full light.

[2236] CICERO, SELECTED POLITICAL SPEECHES 234 (M. Grant trans., 1969).

[2237] *Acts* 17:2. In this verse, Luke describes Paul's method of reasoning with *διελεξατο* (*deilekaseeato*), which denotes verbal expression and discussion: "reasoning together" by expressing and testing propositions back and forth against the ideas of others. Moreover, the genitive here stresses that the Scriptures are the point of contact upon which Paul reposed reason, "from the Scriptures" (*απο των γραφων: apo ton graphone*).

26
Independent Judgment: Fear of Displeasing the LORD

Our present-day common-law Jury stems from the Anglo-Saxon *moot*: an assembly of men of independent judgment. Each man in it operated at arm's length, arriving at the *moot* (assembly) armed with sword and buckler. The Saxons took their tribal name from the *seax* sword, the short personal weapon each man carried to such assemblies. The strength of common-law assemblies is not unity, but individual independence of judgment.[2238]

During the late 1850's, as war approached, American congressmen increasingly attended sessions armed with revolvers. When in assembly, the Members of Parliament of British Columbia express individual approval of proposals brought before them in imitation of their forebearers, and as a reminder of their duty of independent judgment: they slap the table repeatedly with one hand, while holding the other hand below the table as though holding the handle of an ever-ready sword. In traditional common-law government, the courts and officials have carried out their affairs at arm's length with each party maintaining independent judgment. The writer cites these examples from history, not to suggest that our legislators carry weapons, but rather, to show the fierce independence of these ancient practitioners of common-law government, in spite of their willingness to gather in order to arrive at truth in judgment.

Individual independence of thought and mind is indispensable to liberty because it foils concentration of power and tyranny. Where men deem individual independence of little value, courts will soon become dependent on the state. True independence of thought, speech, and action are possible only as the individual achieves direct and total dependence upon the God who made him. Such independence is a fundamental right of conscience and action, thought and speech. God works only through the individual, as he remains independent from the desire to please other men and women, and is devoted, individually, to pleasing God alone.

[2238] In demonstration, over the centuries, the practice of men attending common-law assemblies armed with weapons has persisted according to need. Throughout history, such armed assemblies are evidence of arm's length and independent judgment. Given the charged circumstances and animosity in Washington D.C. in the years just prior to the succession of the Southern States, it is plenty likely that by attending the sessions armed, congressmen averted further violence. On 22 May 1856, circumstance boiled over: congressman Preston Brooks of South Carolina beat Senator Charles Sumner with his Gutte-percha cane, while Sumner was seated at his desk on the Senate floor.

According to Scripture, fear of displeasing other men or women—i.e., seeking their acceptance—brings a snare.[2239] Scripture contrasts the *fear of the LORD*[2240] with the *panic* or "trembling" of man.[2241] The fear of the LORD brings blessing; according to 1 *John* 4:18, this fear is not a fear of God's punishment, but rather, it is the yearning to please God in response to His gift of redemption and a fear of losing that yearning to please Him. Thus, the fear of the LORD is that quality of inner peace, tranquility, and calmness that accompanies the God-given yearning focused on pleasing Him to the exclusion of all others. The structure of the Hebrew phrase *fear of the LORD* indicates that the fear (*yi-rath*) of displeasing God is an impelling desire given by God that motivates the believer to please God.

The fear of man, on the other hand, is the lack of personal peace that accompanies one's drive to be accepted by others: the fear of displeasing men. Put another way, the fear of man is the desperate dependence upon the approval and acceptance of others. The continuance of our common-law freedoms demands the fear of displeasing of the LORD for two reasons: because this God-given quality demands the direct relationship between the individual and his Maker; this direct relational response enables God to disperse authority and justice to work specifically and uniquely through each individual. Without God, the individual is cut-off from the ability to do anything.[2242] Nevertheless, through the individual, God has chosen to work among men.

27
Independent Judiciary: The Constitution's Demand

On 15 February 2007, Supreme Court Justice Stevens stated that in his thirty years on the Court, morale among the federal judiciary has never been as low as it now is. The Justice attributes the low morale of the federal judiciary to low pay and states further that low pay now threatens the independence of the federal judiciary—yearly salary for a federal district judge stands at $165,200, for an appellate court judge $175,100 and for a associate Supreme Court Justice $203,000.

When Congress set the foregoing compensations for federal judges, they were high enough; though these salaries appear to have remained

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[2239] *See Proverbs* 29:25.

[2240] יִרְאַת יְהוָה: *yi-rath Yaweh*.

[2241] חֲרְדַת אָדָם: *ke-radath 'adam*.

[2242] *See John* 15:5–8. The passive form (*ου δυνασθε: dunasthe*) denotes absence of potential and the omission to act.

unchanged, they have dwindled in worth: inflation has diminished them in violation of the Constitution. The Constitution states that Federal "Judges, both of the supreme and inferior Courts . . . shall . . . receive for their Services, a Compensation, *which shall not be diminished* during their Continuance in Office."[2243] Each passing year, however, the Federal Reserve Bank board, by manipulation of the value of money, diminishes the worth of judicial pay. Popular culture calls this deflation of value *inflation*: a word giving the false impression that the devaluation of government sanctioned currency is beyond anyone's control. Congress, however, has abrogated to a private bank board (the chief shareholders of the Federal Reserve Bank), its non-delegable constitutional responsibility to regulate the value of currency. These chief shareholders diminish the value of the dollar more each year through their unconstitutional activities and policies, such as inflation. Moreover, the courts have failed to call Congress to account for breach of its constitutional duty.[2244]

Scripture also address tampering with standards and money. As understood in Scripture, *just*[2245] (*tsedeq*) weights and measures concerns the right relationship between two objects balanced on a set of scales: one of fixed weight (the standard) and the weight of the other to be adjusted to the fixed weight to achieve the balance. Used as a legal term, *tsedeq* signifies adjusting a person's behavior to an unchanging standard.[2246] Moreover, a balance with chiseled weights (the standard) is the tool of the oppressor.[2247] Through unlawful tampering with monetary standards for unjust gain, the few have diminished the pay of federal judges and, as Justice Stevens suggests, now threaten the independence of our federal courts.

The Constitution forbids *any* person from diminishing the pay of federal judges. Indeed, if any person or combination of persons, in government or outside of government, by direct or indirect means, gains the power to diminish the pay of federal judges and does so, then that person or persons has violated the Constitution and has gained potential

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[2243] U.S. CONST. art. III, § 1 (capitals in original, emphasis added).

[2244] *See* U.S. CONST. art. I, § 8, cl. 5: "Congress shall have the power to . . . coin Money, regulate the Value thereof . . . and fix the Standard of Weights and Measures." (capital letters in original). *See generally Deuteronomy* 25:13–16 (calling any tampering with the fixity of standards for weights and measures, an abomination). *See also Leviticus* 19:36. *See generally,* EDWIN VIEIRA JR., PIECES OF EIGHT: THE MONETARY POWERS AND DISABILITIES OF THE UNITED STATES CONSTITUTION (2002) (providing a thorough study of American monetary law and history viewed from a constitutional perspective).

[2245] Hebrew: צדק (*tsedeq*).

[2246] *See Jeremiah* 22:3.

[2247] *See Hosea* 12:7. Hosea uses עשק (*ashack*) to signify oppression resulting from fraud enabled by tampering with standards of weights and measures for unjust gain.

control of federal judges. Thus, it is unlawful to diminish, by direct or indirect means, the pay of federal judges.

28
The State:
Babylon's Power-Tool of Seduction

By seducing imperial-minded leaders of nations and countries, Babylon dominates people. John the Revelator elucidates, writing of the nations that have partaken of the lucre flowing from their leaders', who have fallen prey to Babylon's seduction:

> Fallen, fallen—Babylon the great. She has become a dwelling place of demons, even a stronghold of every unclean spirit . . . because all the nations [*εθνη: etnay*] have drunk of the wine of the wrath of [ablative of source: i.e., *flowing out of*] her fornication; indeed, the earth's kings have practiced fornication with her, and the earth's merchants, from the potency of her luxury, became wealthy.[2248]

John, with feelings indescribable shaking his soul, mixes metaphors, but nonetheless, by his simple vocabulary, makes his point well. Bitterness, hate, anger, and envy have driven Babylon to humble the kings of the earth, subduing them in fornication. The *nations* of which John writes have drunk—by analogy—the wine flowing from Babylon's fornication with the imperial kings as she exploited them, beating them out as grapes.[2249] John's description is vivid: the spirit of Babylonian religion, law, and government has seduced and subdued kings into propagating and practicing doctrines of false law and total government claiming power to provide false security, false peace, and false safety, all of which the nations have imbibed and, thereby, are also seduced, humbled, and dominated. The gist of Babylon's domination and abuse of people is her seduction of, and power over, leaders of imperial states.

Though John the apostle writes in Greek, in *Revelation* 18:1–3 he uses a Hebrew literary form from the Old Testament prophets. For example, *Isaiah* 13:19–22 records the doom song of Babylon, *Isaiah* 34:11–15 records the doom song of Edom, and *Zephaniah* 2:13–15 records the doom song of Nineveh. Likewise, *Revelation* 18:1–3, by

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[2248] *Revelation* 18:2–3.

[2249] Some manuscripts do not include "the wine of," but speak only of "the wrath" and "the fornication." Cf., *e.g.*, Sinaiticus (א), which includes the phrase *του οινου* (*tou oinou*: of the wine); with Alexandrinus (A) and Ephraemi Rescriptus (C), which omit *tou oinou*.

recording the doom song of Babylon, also records the doom song of Rome. Not only is Rome is the offspring of Babylon—one of "the cities of the nations," which shall fall with the city of Babylon proper;[2250] in the New Testament, *Babylon* is a name for Rome.[2251] John writes that devils inhabit Babylon, having become the hold of every foul spirit.[2252] These pagan gods, their strong delusions over men broken, haunt in discontent, the temple remains where once their power had reigned supreme. "Surely," says Barclay, "the most dramatic part of the picture is the demons haunting the ruins."[2253] Those that drink of the wine of the wrath flowing out of Babylon's fornication will experience the wrath of God.[2254]

Given the dangers of Babylonian doctrine and practice, Scripture provides direction for the reader: come out of the place of destruction, that you not partake of her sins, lest you share in her doom.[2255]

Scripture's foregoing warnings and admonitions are part of the due process leading to the final judgment of the Court of the LORD God, given so that every man will have timely notice, invitation, and opportunity save his life from the fierce, awful, and righteous judgment of the LORD against the evil one and those partaking in his works. Defeat of the enemy demands an "aloofness of spirit," says Swete, "maintained at the heart of the world's traffic."[2256] To stay complacent in the place targeted for divine judgment is to die the death.

29
Knowledge of Nature: Weapon Against Priestcraft

Knowledge gotten from learning the movements of the heavenly bodies relative to the times and seasons is neither astrology nor magic, but

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[2250] *See Revelation* 16:19.

[2251] *See* 1 *Peter* 5:13.

[2252] *See Revelation* 18:2.

[2253] 2 WILLIAM BARCLAY, THE REVELATION OF JOHN 151 (1976).

[2254] *See Revelation* 14:8–10.

[2255] *See Revelation* 18:4–5. See also, *e.g.*, *Genesis* 12:1, where God called Abraham out of the city of Ur of the Chaldees; *Genesis* 19:12–14, where He called Lot out of Sodom; *Numbers* 16:23–26, where He called Moses to get clear of the dwelling of Korah, Dathan, and Abiram; *Isaiah* 48:20, *Jeremiah* 58:8, where He told Israel to flee from Chaldea, which is in the midst of Babylon (*see Jeremiah* 51:6); and 2 *Corinthians* 6:17–18, where He now calls His people out. *See* 2 WILLIAM BARCLAY, THE REVELATION OF JOHN 151–52 (1976). Israel's first Passover in Egypt was not foremost a getting out in order to avoid judgment, but a picture of avoiding judgment by getting under the blood of the lamb to come, who is Jesus Christ. In fact, Scripture provides no direct admonitions to Israel to get out of Egypt, but rather, only God's commands to Moses to demand Israel's release for a few days to go into the wilderness to worship: a ruse to plunder the Egyptians of their wealth. *See Exodus* 3:21–22.

[2256] *Quoted in id.* at 152.

rather the Creator's laws of nature, available and open for all to learn. In 1792, Robert B. Thomas, in defiance of any priestly cast or government bureaucrats trying to gather a monopoly of such knowledge, began publishing his *Old Farmer's Almanac* with a string hole at the top of the binding, making it easy for every man to hang his copy on the inside frame of his barn's feed way and for every woman to hang her copy from the corner of her kitchen cupboard for handy reference. In that day almanacs were popular because they contained the calendar for the coming year with astronomical phenomena to occur, weather prognostications, seasonal suggestions for farmers, and other practical information.

Such knowledge is not for the exclusive use of any self-proclaimed elite class, such as a priesthood or government bureaucracy. Indeed, any such elite group will, in time, grow lazy and ignorant, and their advice worthless, especially if placed on the public dole, such as state departments of agriculture employees, whose paychecks arrive regular, regardless of whether or not their advice is right. If the government, said Thomas Jefferson, ever tells us when to plant, where to plant, and what to plant, we shall soon be in want of bread.

The Creator set the sun, the moon, and the stars in the heavens "for signs[2257]and for seasons."[2258] In a word, the heavenly luminaries bespeak to us what will come, when it will come, and where it will come. Further, that which the Creator betokens by the heavenly luminaries and their clockwork-like movements are for the encouragement of God's people and the discouragement of the heathen.[2259] Though the laws of the times and seasons relative to the movements of heavenly bodies are often unexplainable, they are, nonetheless, reliable, showing again that God has made every person to know His laws, having stamped into every person the ability to discover His laws, and has placed such knowledge, says John Locke, within every person's reach. The heavens not only betoken the great and final consummation of all things, but also, in the meantime, they effect creation in smaller things. For example, the deft predictability of the ocean tides is in exact relation to the regular movements of the heavenly bodies.

Such rules of the physical creation are not superstition, but evidence of the reliability of the Creator's laws of nature. The patterns of some of these laws are more obvious than are others. For example, all can take

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[2257] Hebrew אתה (*othoth*): plural of the verb אתה (*ha-tha*), meaning "things to come." *Genesis* 1:4.

[2258] Hebrew מואד (*mow-edth*): from the verb יעד (*yah-adth*), to appoint, i.e., time and place of their coming]. *Id.*

[2259] *See Jeremiah* 10:2.

notice that the sun rises and falls every 24 hours and the four seasons come every year. The patterns of other laws, however, require closer attention and more time to see and become confident of them.

Those persons depending direct upon the patterns of nature's laws for their livelihoods grow alert to such patterns and laws of the heavens and weather. Some of these patterns prove themselves only over long periods of close observation; others, though appearing to be patterns over the short term, prove to be long-term exceptions to greater patterns. In any case, God's laws in nature are His general revelation of His wondrous power, incomparable creativity, and all-knowing intellect; by following them comes benefit. In truth, no farmer can ignore them and survive.

The writer recalls learning the following examples, first, from the experience of others and then through his own experience. Fence posts set while the moon is coming in will stay tight; fence posts set while the moon is going out will go lose—no matter how much one tamps down the dirt. Hogs bred when the moon is coming in will have larger litters. Root crops, especially potatoes, planted while the moon is coming in will go to top—i.e., the blooms will be large and beautiful but the potatoes will be small and few; root crops planted while the moon is going out will produce better—i.e., the potatoes will be larger and more plentiful. Turnips at our latitude and longitude of the Wabash Valley grow best if sown on 27 July, rain or dry. Corn makes its best stand if planted when the shagbark hickory tree leaves are the size of squirrels' ears; further, it is growing well if knee high by the Fourth of July. Water in a pond or horse tank suspends fewer algae when the moon is going out and thus is the best time to pump water from a pond or horse tank because the pump's filter will not clog. As to weather, if a ring formed around the moon, a man knew his that the number of days left to plant, put up hay, or harvest were limited, at the most, to the number of stars seen within the ring because rain will come within the same number of days.[2260]

Other supposed laws of nature were taught the writer, but some of these proved wrong or he never saw enough of a pattern to be convinced of their reliability. For example, his grandpa insisted to him over and over—in no uncertain terms and forbidding it be done while they worked together—that if a fellow saws down a tree in the wintertime and then sets on the stump, he will catch a cold. In later years, the writer put this

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[2260] See also, *e.g.*, *Matthew* 16:1–4, *Luke* 12:54–57, wherein Christ reminds the legalists that though they can read the laws of nature in the sky—i.e., red sky at night, sailors' delight; red sky in the morning, sailors take warning—and know when it will rain and when a hot, dry wind will blow; they refuse to discern from the Scriptures two things: the signs (what is going to happen, i.e., events) and the seasons (when and where events will happen). *See supra* this app., *expositing Genesis* 1:14.

supposed rule to the test a few times and found it untrue. Second, the nations' greatest schools of agriculture used to claim rats will never live with hogs. This, said their professors, is a law of nature; thus, keeping hogs on a farm will keep rats off the place. The writer, however, discovered this claim untrue: rats will not only live with hogs, but will thrive with them, using the hogs' body heat in the winter to keep warm, and even feeding at the trough with hogs. In short, rats will flourish with hogs. Thus, God has made them; thus, the writer has seen over many years.

Man understands God by understanding the things He has made. Consequently, to learn about nature is to learn of nature's God, which also arms man against the abuses of priestcraft.

30
Natural Law:
Scholastics –vs– Scripture

Having shed old labels, the civil law continues to propagate and enforce theories of Greek philosophy as Rome's medieval scholastic doctors articulated them. The early Roman Church took up the Greek's natural-law theory and labeled it *Christian*. The Greek's theory, however, is materialistic and, thus, impersonal, teaching that nature—i.e., the material world; in particular, the human brain—is the ultimate source of law. The Greeks' and the Roman Church's use of the word *natural* in referring to law is unrelated to any biblical concept, but refers to their theory confining law and its source to the natural, material world.

Continuing in the spirit and method of the Greek philosophers, the medieval scholastics sanctified Rome's natural-law theory in the minds of many as *sacred and Christian* natural law; it is neither. Regardless of the jargon used, Rome's theory of natural law is contrary to the natural law Paul the apostle presents in *Romans* 2:14–15. Scholastic writers use Scripture's references to natural law merely as additional items for consideration, not as controlling authority.[2261] At bottom, scholasticism subjects the Scriptures—the unblemished[2262] authority on natural law—to

[2261] To hold God's Word written as an additional and co-equal authority with the mind of any mere human is to debase that Word to the feebleness of humanity: the doctrine of Roman theology and civil law. Roman theology, following Greek humanism, holds the minds of the civilian priests (civil lawyers) to be superior to God's Word: claiming the Church (the priesthood) has produced and continues to produce the Word of God, instead of the seed of Word of God have producing the Church.

[2262] *See Psalm* 19:7. *Perfect*, תמים (*tamim*): an unblemished and complete body of directives. The terms of this verse compare the written Word of God to the unblemished sacrifice of the living Word of God, viz., Jesus Christ. See, *e.g., Exodus* 12:5, 29:1, where

human reason[2263] with its ever-present blotches of ignorance and taints of bias.

Expounded in *Romans* 2:14–15 and shown elsewhere in Scripture, natural law is foremost a biblical concept. Since, as Scripture teaches, flaws stain the mind of man, he must doubt his natural reason alone as the final test of truth. Scholasticism demands legal positivism: the state's exercise of Rome's natural-law theory. A nation is positivistic when it submits to the state's pronouncements of right and wrong as though final, i.e., without appeal.

The difference between freedom of a people and their slavery to the state turns on this single point: if the will of the state, expressed through legislation, claims to be the final arbiter of law's application from which there is no genuine appeal, government is despotic, enslaving those under its power. If, on the other hand, all acts of a government are subject to the independent consciences of individuals, in and out of government, people will experience freedom, at least to the extent that their consciences have right knowledge. Freedom, therefore, depends

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Moses uses *tamim* to describe the requirement of any sacrifice offered, i.e., without taint or blemish: neither lame, nor sick, nor blind, nor halting.

[2263] Aquinas articulates Rome's theology in support of the civil law and the state, concluding that the framing of laws belongs exclusively to that public personage holding the power to enforce that law by inflicting the law's penalties. *See* 1 THOMAS AQUINAS, THE BASIC WRITINGS OF THOMAS AQUINAS 746 (1945). "[T]he will of the sovereign," writes Aquinas, "has the force of law." *Id.* at 744. Completing the elevation of man's mind over God's, Aquinas states that the divine will is subject to human reason. *Id.* at 766. In keeping with the foregoing, Aquinas defines law to be "nothing else than a dictate of reason in the ruler by whom his subjects are governed." *Id.* at 758. These theological notions are the heart of the scholastic doctors and form civil law's foundation. Aquinas, therefore, defines government as human *will* and defines law as human *reason*; these constitute humanism's government of men and not of law.

Aquinas supports the view—and herein lays the difference between civil law's trust of human reason and common law's distrust of it—that although other aspects of man are corrupted by sin, human reason remains untainted, able to arrive at and accept the truth. Scripture, however, declares, "[T]he *natural* man *cannot* [*ου' δυναται* (*ou' dunatai*): the phrase denotes total lack of moral power to discern and accept good, as distinguished from the physical power *(ισχυω: iskuo)* required to execute it] accept the things of Spirit of God." 1 *Corinthians* 2:14. Moreover, "*ου'* (*ou'*) was always used for the unequivocal, direct, absolute, and objective denial of an affirmation; but if the denial is hypothetical, *μη* (*may*) was invariably used." Dr. C.B. Williams, *Unpublished Grammar Notes*, *quoted in* H.E. DANA AND JULIUS R. MANTEY, A MANUAL GRAMMAR OF THE GREEK NEW TESTAMENT 266 (1927). In 1 *Corinthians* 2:14 Paul uses *ou*, thus denying all ability in the unregenerate to receive the Word of God.

God desires one's worship with the entirety one's mind, not to attempt to worship God, while trusting the power of his own mind. To trust in the mind of man, while at the same time, attempting to worship the Creator, is idolatry: any attempt to worship and serve a created thing. *See Romans* 1:25, *Exodus* 20:3. Further, to trust in the human mind is contrary to the wisdom of our national motto: *In God we trust*. The common-law tradition seeks reasonableness by progressively subjecting human reason to greater authority and testing it against the wisdom of experience. See generally § 5.1.2 of this book (discussing *Romans* 2:14–15 and natural law).

upon conscience: the common ability, supplied by the common grace of God, of each individual to recognize right from wrong. Moreover, it is the task of God's people to inform the consciences of others with right knowledge.

Natural law, as Scripture presents it, means not that everyone knows what is right and what is wrong in any given circumstance, but instead, that everyone is able to discern right from wrong for that circumstance, to the extent that his conscience holds right knowledge. God's Word puts God in proper perspective, which is the beginning of a rightly informed conscience, the bulwark of freedom. In the common-law tradition, the Jury are a foundational tool, allowing the natural law to flow into law and government.

31
Day of Man & the Lord's Day

Roman civil law's inquisitorial system usurps God's prerogatives. The Bible refers to this age as *the day of man's administration of law and government* and points to the DAY of the LORD's administration of law and government: viz., "The LORD's DAY," when the Messiah shall exercise all three offices of government.[2264] Paul the apostle, familiar with the prophecy of Joel and others in Scripture of the same theme, sets the DAY of the LORD's judgment in contrast to this present day of man's judgment. In 1 *Corinthians* 4:3, Paul denotes the day of man's judgment with the phrase *ανθρωπινης 'ημερας*[2265] (*athrowpinays haymeras*: "day of man" or "man's day"). Some modern English translations rightly render this idiom "man's judgment" because these present days are collectively the *day* or times of man's administration of justice until the LORD's return.

Thus, Paul distinguishes the basic difference between the *DAY of the LORD* and the *day of man*. The LORD's worthiness justifies Him alone to examine and expose the thoughts and intents in the uttermost recesses of the human heart. Paul observes, however, that in the day of man's judgment, statist-minded officers and magistrates, lustful to know and

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[2264] Isaiah states: "The LORD is our judge [judicial function], the LORD is our lawgiver [legislative function], the LORD is our king [executive function]." *Isaiah* 33:22. See also *Joel* 1:15, 2:1, 31, 3:14, for references to the LORD's DAY. See generally *Revelation* 1:10, for a possible reference to the LORD's DAY as the time of His administration of justice on earth. Such a view is in keeping with John's references to *Joel* and John's apocalyptic judgment theme in *Revelation*. Regardless of the view taken of *Revelation* 1:10, John's *Revelation* is John's vision the DAY of the LORD.

[2265] The Greek suffixes *–πινος* (*pinos*) and *–πινης* (*pinays*), modify the noun to which they attach by indicating a season or spell of time. In the case of *ανθρω-πινης 'ημερας* (*anthrow-pinays haymeras*), it refers to the present season of time, during which God has entrusted authority to humankind to administer justice on earth.

dominate another's inner-most convictions, seek by inquisitorial tools and doctrines—such as the confessional, entrapment, guilt by association (conspiracy), and the fear and pain of blackmail and torture—to extract such private convictions. To do so, however, usurps God's prerogative.[2266]

In describing "man's day," Paul says that it is a small thing to him that he is "judged under them," that is, under the judgment of men. In so stating, Paul uses the civil-law term from the inquisitorial courts of Rome: *ανακρινω* (*anakrino*).[2267] Found in Greek and Roman literature, Luke also uses *anakrino* to describe Pilate's inquisition of Jesus,[2268] the Roman governor Tertullus's inquisition of Paul the apostle,[2269] Herod's inquisitional tribunal for capital offences of prison guards,[2270] and King Agrippa's inquisitional interrogation of Paul the apostle.[2271]

To determine the inward intents of another's heart in this day of man's judgment, demands objective evidence, perceivable by the senses; the DAY of the LORD's judgment, however, does not, for the LORD knows all, including the innermost thoughts and intents of the heart. The following three passages of Scripture acknowledge the necessity of objective evidence in this day of man's judgment: *Matthew* 7:16, where Christ states, "You shall know them by their fruits"; 1 *John* 1:1–4, where John provides testimony of his sensual awareness: hearing, seeing,[2272]

[2266] The foundations of Christianity must be the Christian's deepest convictions: the sinless life, sacrificial death, and bodily resurrection of Jesus Christ as revealed by Scripture. Christ admonishes not to cast pearls (such convictions) before swine. *See Matthew* 7:6. In 1533, replying to Sir Thomas More's promotion of inquisitions, St. Germain advocated the virtues of the common law's accusatorial tradition over the inquisitorial procedures of the cannon law. St. Germain insisted upon an identified accuser other than the judge, accusations in open court enabling the accused to confront his accusers in open court, and specification of the charges. Only God, said St. Germain, "is the sercher of man herte." LEVY, *supra* note 712 at 65–66, *citing* A. Lawrence Lowell, *The Judicial Use of Torture* (pt. 1), XI Harv. L. Rev. 220, 224–25 (1897–1898) (archaic spelling in original).

[2267] Greek *ανακρινω*. The Greek, *αγγαρευω* (*aggareuo*), found in *Matthew* 5:41, is also a notable term from Rome's inquisitional system. A Babylonian word brought into the Greek language from Persia, *aggareuo* refers to the practice of impressing others into imperial (the emperor's) service. Although *aggareuo* is a technical legal term, the Hebrews widely understood it because the practice it denotes moved to moral outrage in them. Modern Greek retains the term with the meaning "compelling." Alexander's armies of probably brought the term west from Persia—as they did many other Babylonian words—because by the third century B.C., it appears in general use in the Greek papyri. *See* ADOLF DEISSMANN, BIBLE STUDIES: CONTRIBUTIONS CHIEFLY FROM PAPYRI AND INSCRIPTIONS TO THE LANGUAGE, THE LITERATURE, AND THE RELIGION OF HELLENISTIC JUDAISM AND PRIMITIVE CHRISTIANITY 86 (Alexander Grieve trans., 1901).

[2268] *See Luke* 28:14.

[2269] *See Acts* 24:8.

[2270] *See Acts* 12:19.

[2271] *See Acts* 28:18.

[2272] John uses *εωρακαμεν* (*eohrakamen*): Greek perfect, denoting objective sight, affording conclusions.

observing,[2273] touching, and handling; and *James* 2:17–25, where James insists that man's judgment of inward realities entails outward evidences, "I will show you [*δειξω* (*deiksee-o*): i.e., prove by exhibition] my faith by my works." In such passages, Scripture recognizes that in order to judge aright, men (unlike the omniscient God) must ponder tangible evidence.[2274]

Not only is it impossible for one to know the innermost yearnings of another's heart, one even remains unsure of the innermost intents of one's own heart until God reveals such hidden realities by one's obedience according to one's faith—or his disobedience according to fear. For example, during Abraham's encounter with God in *Genesis* 15:6, God justified Abraham in the Courts of Heaven in deed. Still, at God's declaration of Abraham's justification, Abraham remained unconvinced of both his justification and his faith, asking God, "How do I know . . . ?"[2275] Abraham lacked confidence of his justification until years later, when God confirmed it to him through his obedience of faith on Mount Moriah.[2276]

Today is the day of fallen man's attempts at judgment; unredeemed men prefer to use the inquisitorial devices of civil law. God, however, has never authorized men to exercise inquisition. Nevertheless, desiring to be as God, man uses whatever abuses are necessary to tear open and expose the private consciousnesses of others in an effort to obtain and maintain domination and control of his fellow man, enabling exploitation. Power will corrupt a magistrate or office holder in direct proportion to the amount of power available to him for abuse; where available, no one holding or seeking government office is exempt from this temptation—no, not one.

[2273] John uses *εθεασαμεθα* (*etheasametha*): Greek middle voice, denoting calm and continuous objective observation with subjective contemplation.

[2274] In *Parable of the Wicked Mammon*, William Tyndale expresses well the necessity of tangible evidence for any intelligent judgment by men:

> The fruit that grows on a tree does not make the tree good or bad, it only makes known whether the tree is a good tree or a bad tree; and works do not make a man good or bad, they only make it plain to other men whether the man who performs them it good or bad. There is an inward justification of man before God which is by faith alone: works serve only to make his justification known before men.

[2275] That *Genesis* 15:6 concerns a close relationship of covenant promise and not judicial judgment is clear in that God remains un-offended by Abraham's questioning. The only questions allowed from those standing before courts of judgment are rhetorical and tempered with respect.

[2276] *See Genesis* 22:1–18.

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